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HARVARD LAW LIBRARY

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO

BY R. B. WARDEN & J. H. SMITH

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NEW SERIES
VOLUME III

CINCINNATI
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1874

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JUDGES
OF THE
SUPREME COURT OF OHIO,
FOR THE YEAR

Commencing February 9, 1853.

HON. THOMAS W. BARTLEY, *Chief Justice.*

HON. JOHN A. CORWIN, HON. ALLEN G. THURMAN, HON. RUFUS P. RANNEY, HON. WILLIAM B. CALDWELL,	}	<i>Judges.</i>
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ATTORNEY-GENERAL,
GEORGE E. PUGH.

Commencing February 9, 1854.

HON. JOHN A. CORWIN, *Chief Justice.*

HON. A. G. THURMAN, HON. RUFUS P. RANNEY, HON. WILLIAM B. CALDWELL, HON. THOMAS W. BARTLEY,	}	<i>Judges.</i>
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ATTORNEY-GENERAL,
GEORGE W. McCOOK.

First Division of December Term, 1854.

HON. ALLEN G. THURMAN, *Chief Justice.*

HON. RUFUS P. RANNEY, HON. THOMAS W. BARTLEY, HON. ROBERT B. WARDEN,* HON. WILLIAM KENNON,†	}	<i>Judges.</i>
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* Appointed to fill the unexpired term of Hon. J. A. Corwin, who had resigned. Judge SWAN was elected to succeed Judge CORWIN.

† Appointed to fill the unexpired term of Judge CALDWELL, until a regular successor should be elected.

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PREFACE.

THIS volume is properly divided into three parts, according to the date of the decisions, and the changes in the constitution of the court.

The first part embraces certain cases, which were not included in the first division of the last volume, for reasons given in the preface to the volume referred to. In the second part, are cases omitted in the second division of the last volume, for the same reasons. In the third part, are the cases furnished to the Reporter, of the decisions made at so much of the last term, as, according to the directions of the court, was to be represented in this collection,

As to the third part, JAMES H. SMITH was the Reporter, during the session of the court; having been appointed at the beginning of the term, when his predecessor was appointed to fill the unexpired term of Hon. J. A. CORWIN. On the expiration of the last-named appointment, Mr. SMITH resigned, and ROBERT B. WARDEN was again appointed Reporter. In view of these facts, it has been thought proper to use the names of WARDEN & SMITH as Reporters of this volume.

The division referred to has not been noticed in the paging.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO,
FOR THE YEAR COMMENCING
FEBRUARY 9, 1853.

PRESENT:
HON. THOMAS W. BARTLEY, CHIEF JUSTICE.
HON. JOHN A. CORWIN,
HON. ALLEN G. THURMAN,
HON. RUFUS P. RANNEY, } JUDGES.
HON. WILLIAM B. CALDWELL, }

**EXCHANGE BANK OF COLUMBUS v. O. P. HINES, TREASURER OF
FRANKLIN COUNTY.**

The tax law of April 13, 1853, is valid and constitutional in the basis it provides for the taxation of banks, bankers, and brokers.

The tenth section of that law, which allows individuals and certain corporations, in giving their tax lists, to deduct their liabilities from the amount of their moneys and credits, is repugnant to the constitution of Ohio, and is void. The constitution permits no deduction of liabilities from moneys and credits.

But that section may be treated as void, without affecting the validity of the remainder of the act. The remainder of the act permits no such deductions.

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Choses in action are to be listed at their true value. If a note, for instance, is wholly worthless, it is not to be listed at all; if it is of some value, but less than its face, it is to be listed at what it is worth.

The fact that property subject to taxation has not been listed, although it improperly increases the burden of taxation upon the property that is listed, does not render the tax wholly void, or authorize the interference of a court of equity.

2] *Neither, in such a case, is the treasurer who has distrained liable to an action; for it is not his fault that the property is not listed.

The tax law of 1852, although it prescribes a different mode and greater rate of taxation than is provided for in the 60th section of the banking law of 1845, is not repugnant to the constitution of the United States.

But if it were, a court of equity has no jurisdiction to restrain the collection of the tax by injunction, even though the county treasurer may individually be insolvent. For an action of trespass affords a complete remedy at law to recover a judgment, and the act of March 14, 1853, "to enforce the collection of taxes," etc., provides the means for the payment of such judgment.

BILL in chancery. Reserved in the county of Franklin.

The bill was in substance as follows: That the Exchange Bank of Columbus was duly organized as a banking corporation, in the year 1845, under the provision of the act passed February 24, 1845, entitled "an act to incorporate the State Bank of Ohio, and other banking companies," and became a branch of the State Bank, located at Columbus, and has ever since kept up its organization, and complied with all the requisitions of the act.

That by the 60th section of that act it was provided that "each banking company organized under said act, or accepting thereof and complying with its provisions, shall semi-annually, on the days designated in the 59th section of said act for declaring dividends, set off to the state six per centum on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which said company or the stockholders thereof are subject; and the cashier shall within ten days thereafter inform the auditor of state of the amount so set off, and shall pay the same to the treasurer of state on the order of said auditor, but in computing the profits of the company, for the purpose aforesaid, the interest received on the funded debt of the State of Ohio, held by the company, or deposited with and transferred to the treasurer of state or the board of control by such company, shall not be taken into account." In pursuance of the 59th and 60th sections, the

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*cashier, on the first Monday of May, 1852, and on the first [3 Monday of November, 1852, set off to the State of Ohio six per centum of the profits, deducting the expenses and ascertained losses for the preceding six months. The sum so set off in May, amounted to five hundred and fifty-four dollars and sixty cents; and the six per cent. set off in November, amounted to six hundred and eighty-two dollars and four cents; and within the ten days, as provided by law, the cashier informed the auditor of state of the amounts set off, and the bank has always since been ready and willing to pay the said sums to the treasurer of state, on the order of the auditor, and still is willing and hereby offers so to do.

That Oliver P. Hines, treasurer of Franklin county, acting or pretending to act in his official capacity, demands of the bank the sum of four thousand six hundred and seventy-two dollars and ninety-seven cents and nine mills, as taxes due for the current year of 1852, being the amount assessed on the grand duplicate now in the hands of the treasurer for collection, under the 19th and 20th sections of the act passed April 13, 1852, entitled "an act for the assessment and valuation of all property in this state, and for levying taxes thereon according to its true value in money;" that the average amount of all notes and bills discounted and purchased by the bank, and of all other moneys, effects, and dues of every description, belonging to the bank on the 31st day of May, 1852, and on that day returned by the president and cashier of the bank under protest to the auditor of Franklin county, amounted to the sum of two hundred and ninety-seven thousand six hundred and fifty-two dollars and ninety cents, and that the tax now claimed is one fifty-seven one hundredths per cent. on that sum, being the rate of tax levied on the grand duplicate for state, county, city, and other purposes.

That the liabilities of the bank on said 31st day of May, 1852, amounted in the aggregate to one hundred and fifty-seven thousand and seventeen dollars and thirty-five cents, *and were made up [4 of the following items, to wit: bank-notes in circulation, \$117,382; due to banks, \$9,431.18; due to depositors, \$26,649.57; due on state tax, \$554.60; which, being deducted from said assets, would leave a balance of only \$140,625.55.

That the said tax so assessed against the bank on the duplicate, to wit, the said sum of \$4,672.97.9, exceeds by the sum of \$3,436.33.9 the total of said six per centum on the profits so set off in lieu of all

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taxes for the year 1852, and is more than double the tax that would be levied on the capital stock and undivided profits of the bank, or on the cash or market value of said stock, including the undivided profits of said bank, at said rate of one fifty-seven one-hundredths per cent., and amounts to about thirty-three elevenths per cent. upon the stock and undivided profits.

That the capital stock of the bank paid in amounts to the sum of one hundred and twenty-five thousand dollars, and is divided into shares of \$100 each; that the undivided profits of the bank amounted, on the 31st day of May, 1852, to the sum of \$15,110.84, and that the cash and market value of said stock then was and now is about \$137,500, the same being at an advance of about ten per cent. on its par value.

That the said tax so assessed is in violation of the provisions of the act of February 24, 1845 (under which the bank was organized), which provisions, the bank is advised, amount to and are a contract between the bank and the State of Ohio, that no other or greater tax shall be assessed or levied on the bank than the six per centum on profits therein stipulated. That, further, the said tax is also a violation of the constitution of the State of Ohio, inasmuch as the same is greater than the burden of taxation imposed on the profits of individuals, and is entirely above the uniform taxation of other persons and imposed on other property not concerned in banking; and that the said illegal tax, and the assessment thereof, work an irreparable mischief to the bank, depress the value of its stock, and 5] tend to the *destruction of its chartered rights, inasmuch that if no relief is granted, the company may be compelled wholly to forego the business of banking before the expiration of its charter. That the defendant is about to proceed to compel the payment; or enforce the collection of said illegal tax by process of distress against the bank.

That the bank is advised that the court has jurisdiction of the case, and that no adequate relief can be had at law. And the bank states and believes, that the defendant is not of sufficient ability or pecuniary responsibility to satisfy the damages which would be suffered by the bank, in case he should proceed to collect the tax as aforesaid.

The prayer of the bill was, among other things, that an injunction be granted and allowed, to restrain the said defendant from collecting said illegal tax, either by distress or otherwise, until this

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matter can be further heard, and until further order of this court; and that at the final hearing, said injunction may be made perpetual. In the common pleas an injunction was allowed, and there was an answer filed which it is not necessary to notice, it having afterward been withdrawn and a demurrer filed.

The final decree of the common pleas dissolved the injunction, and the complainants appealed to the district court. In that court, leave was given to withdraw the answer and demur, and on demurrer being filed, the cause was reserved for decision by the Supreme Court.

The case was orally argued by *Henry Stanbery, J. R. Swan*, (of Swan & Andrews,) *C. P. James*, and *Mr. Hutchins* for complainants. *Geo. E. Pugh*, attorney-general, *R. P. Spalding*, and *R. B. War-
den*, for defendant.

BARTLEY, C. J. Several interesting and important questions are presented for determination in this case, the most prominent of which involves the validity of the statute of the *13th of April, [6 1852, for the assessment and valuation of *all* property in this state, and for levying taxes thereon according to its true value in money. It is claimed that this law is in conflict with the constitution of the state, on the alleged ground, that it imposes a burden of taxation on the property of the complainant, employed in banking, greater than that which it imposes on the property of individuals; also, that it is repugnant to the constitution of the United States, on the alleged ground that it is in violation of a material and important provision in the charter of the bank, contained in the statute of the 24th of February, 1845, to incorporate the State Bank of Ohio and other banking companies, which, it is claimed, constitutes a contract between the claimant and the State of Ohio.

The question whether the charter of an incorporated bank is a contract, and whether, upon this ground, the banks existing under the authority of the bank law of 1845, are, by virtue of the constitution of the United States, placed beyond the reach of the legislative control of the state over the power of taxation, was very fully considered by this court at the last term, and determined against the ground taken in the bill by the complainant in this case; and we see no reason to disturb the opinion then expressed. See *Bank of Toledo v. The City of Toledo et al.* 1 Ohio St. 623; *Knoup v.*

Piqua Bank, Ib. 603 ; Mechanics' and Traders' Bank v. Debolt, Ib. 591 ; and Debolt v. The Ohio Life Insurance and Trust Company, Ib. 563.

The question, whether the tax law of April, 1852, imposes a burden of taxation on property employed in banking, greater than that which is authorized by the constitution of the state, is one of grave import, requiring a careful and full examination. And the difficulties and embarrassments to which it has given rise, and is still causing in the collection of the public revenue, and enforcing the laws of the state, indicate the propriety of a very full expression of opinion by the court.

7] *The third section of the twelfth article of the constitution, which confers the authority for taxing property employed in banking, is as follows :

"The general assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description, *without deduction*, of all banks now existing, or hereafter created, and of all bankers ; so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals."

This provision imperatively requires that *all property, effects, and dues of every description* belonging to banks should be taxed. The great variety of form and condition in which property is employed in banking, as well as its complex convolutions and varying character, is somewhat peculiar. But those things employed in this business, which constitute proper subjects of taxation, in whatever form or character they may be found, must possess the essential elements and incidents of private property, and are therefore capable of being clearly and certainly ascertained and identified.

It is proper here to remark, that it is said to have been determined by high authority that the *franchise* of an incorporated bank is the subject-matter of contract, and *property* of a clear and distinct character. If the corporate franchise of a bank be, in fact, *property or effects of any description whatever*, it is made a subject-matter of taxation by the imperative language of the constitution above recited, and should be placed on the list of assessments for that purpose.

But what is the fact? Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said

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that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function of making and circulating paper money, is valuable—indeed, a thing of great value. But *value* is not the distinguishing attribute of property. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; a license to keep a tavern, as formerly granted in this state, or a license to carry on any special business, which is prohibited without *a special grant of authority from the government, may be [8 valuable; and a right to either of these things may be asserted and maintained in a court of justice, yet neither of them possess the essential qualities which constitute property. Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the government, may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject-matter of private property, are such as the owner may exercise exclusive dominion over in the use, enjoyment, and disposal of them, without any control or dimunition, save only by the laws of the land. 1 Wend. Bl. 138. It is a fundamental principle, that "property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them." Rutherford's Institutes, 20 Puffendorf, chap. 9, b. 7.

It is said that capability of alienation or disposal, either by sale, devise, or abandonment, is an essential incident to property. 2 Kent. Com. 317.

A corporate franchise, therefore, being a mere privilege, or grant of authority by the government, is not *property of any description*, and consequently not subject to taxation under the above provision of the constitution.

The statute under consideration provides as the basis for the tax upon banks: 1. The average amount of the notes and bills discounted or purchased, including all the loans or discounts of every description, at their actual value in money; and, 2. The average amount, at the like valuation, of all other moneys, effects, or dues of every description, *used and employed in banking with a view [9

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to profit. There is nothing in this provision of the law which is in conflict with the constitution. The complaint is not that the banks are taxed upon anything which is not a legitimate subject of taxation, but that the burden of taxation imposed on property employed in banking is greater than that which the law imposes on the property of individuals; not that the rate of taxation is greater, but that, by the tenth section of the law, a large amount of the property of persons not engaged in banking, is substantially exempted from taxation, by allowing them to deduct their liabilities from the gross amount of their *moneys* and *credits*, in furnishing their lists for taxation; and that the aggregate taxable valuation of property being thus less than it should be, the burden of taxation on property employed in banking, is proportionably too great. This necessarily involves the question of the constitutionality of the deductions allowed by the tenth section of the law. The test, whether a question is presented for adjudication in a case, is not whether the case might not be decided on some other ground, but whether its determination becomes material in disposing of a point which is decisive, either in whole, or in part, of the case. The validity of this provision of the law, is necessarily drawn into question, has been elaborately argued by counsel on both sides, and is the main question presented by the parties for our determination in this case. The tenth section of the law is in these words:

"SEC. 10. In making up the amount of moneys and credits, which any person is required to list for himself or any other person, company, or corporation, he shall be entitled to deduct from the gross amount of moneys and credits the amount of all *bona fide* debts owing by such person, company, or corporation, to any other person, company, or corporation, for a consideration received; but no acknowledgment of indebtedness, not founded on actual consideration, believed, when received, to have been adequate, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the meaning of this section; and so much only of any liability, as surety for others, shall be deducted, as the person making out the statement believes the surety is legally and equitably bound to pay, and so much only as he believes such surety will be compelled to pay on account of the inability or insolvency of the principal debtor; and if there are other sureties who are able [10] to contribute, then only so much as the surety in whose behalf the statement is made, will be bound to contribute; provided, that nothing in this section shall be so construed as to apply to any bank, company, or corporation, exercising banking powers or privileges."

The effect of this provision, is to allow a very large amount of the moneys and credits in the state, belonging to persons not engaged in banking, to be exempt from taxation. The question whether exemptions or deductions thus permitted, are forbidden by the constitution, involves the consideration of the true interpretation of the second section of the twelfth article of the constitution, which is in the following language :

"SEC. 2. Laws shall be passed, taxing, by a uniform rule, *all moneys, credits*, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money ; but burying-grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempted from taxation ; but all such laws shall be subject to alteration or repeal, and the value of the property so exempted, shall, from time to time, be ascertained and published, as may be directed by law."

The manifest effect of this constitutional provision, is to make *property* the basis, and the *sole* basis, of taxation. And the object being equality and fairness, it requires, by a true interpretation :

1. That the taxes shall be assessed on *all* property in the state, except the subjects of the specified exemptions.
2. That the taxes shall be assessed on all property, by a *uniform rule*. And,
3. That all taxable property shall be taxed at its *true value in money*.

An exposition of the fundamental principle upon which the constitutional provisions relating to taxation are founded, may aid in their true interpretation.

Taxation is that tribute for the support of government, imposed on property in return for the protection and advantages which the government affords to the owner. It is an essential and fundamental requisite in the exercise of the power of taxation, that the burden should be imposed or apportioned with all practicable equality and justice. See Puffendorf *ch. 9, b. 7 ; Ruther- [11 forth, 27, 273 ; Bank of Toledo v. Bond, 1 Ohio St. 699. It is with a view to this essential condition, that any people consent to confer

this high civil function upon their government. Rutherford's Institutes of Natural Law, 272.

An unequal and unjust system of taxation prevailing in this state, was one of the most prominent causes of the call of the late constitutional convention, and of the adoption of the present state constitution. And in the formation and adoption of the constitution, the principle of taxation most just and equal in its operation, was very fully discussed and considered. It was conceded on all hands that the levying of taxes by the poll was oppressive, and should be prohibited; and *property* was made the *sole basis* of taxation. It was contended, however, by some, and has been suggested in the investigation of this case, that in adopting property as the sole basis of taxation, the most equitable rule would be to tax every person equally, not upon the value of all his property, but upon the amount which the value of all his property should exceed the amount of his indebtedness; in other words, upon the amount he would be worth over and above the amount of his debts. This was, however, found wholly impracticable. In the complexity and various involutions of business, and the infinite variety of form and condition in which property and indebtedness are found to exist, it would not be practicable to ascertain, with any degree of certainty, equality, and fairness, the amount of property which every person was worth, over and above his indebtedness. And taxation being the tribute for the support of government, in return for the protection and advantages received by the owner, it is but fair and just that the burden should be proportioned to the amount of property owned and secured by the protecting hand of the government, and not to the amount which the value of a person's property exceeded the amount of his indebtedness. It is not uncommon for a person to own property to a very large amount, consisting of lands and a great variety of chattel property, and yet be indebted 12] in *an amount far exceeding the value of all his property. A person might be extensively engaged in mercantile, mechanical, and other branches of business, and the owner of property, both real and personal, to an amount exceeding a million of dollars in value, and yet be indebted to persons in other states, whose credits are beyond the reach of taxation, to an amount even greater than the value of all his property in this state. Would it be just and fair that such a person should be wholly exempt from taxation—that this immense amount of property, both real and personal,

should be favored by a total exemption, because of the indebtedness of the owner? Upon such a principle, what an immense amount of productive property of the state, both real and personal, would wholly escape taxation! What inducements would such a system hold out to persons to prolong the payment of their debts! And to what a fearful extent would it lead, in the creation of fictitious liabilities, in fraud of the revenues of the state, the detection of which, requiring evidence, perhaps, from various parts of the Union, would be wholly beyond the reach of the tax assessors.

Under such a system, the most legitimate subjects of taxation would be liable to be withdrawn from the grand levy of the state every year. A, owning a farm assessed for taxation at ten thousand dollars, sells out to B, on a credit of ten years, for ten thousand dollars, and removes to Indiana, taking with him his credits. B, owning nothing but the farm, and being indebted to the full extent of its valuation, would be entitled to hold it exempt from taxation; and A, holding his credits in another state, would be beyond the reach of an assessment on them here. Again, C, residing in Kentucky, but owning personal property on his farm in Ohio, consisting of horses, mules, and cattle, assessed for taxation at fifty thousand dollars, sells out to D on an extended credit for fifty thousand dollars. D would be entitled to hold this personal property exempt from taxation, while C is beyond the reach of taxation on his credits. And again, E purchases a stock of goods, and embarks in the *mercantile business on his own capital*, to the amount of [13] twenty thousand dollars. And F goes to New York and purchases goods to the amount of twenty thousand dollars, *on credit*, and brings them into this state, and engages in the mercantile business to an extent equal to that of E. Under the system of taxation in question, E would be compelled to pay a tax upon his whole capital invested, while F, requiring equal protection from the government, would do a business on his twenty-thousand dollars' worth of goods, exempt from all taxation. And this principle of taxation, carried out, would enable merchants in New York city, who are indebted more than they are worth, to bring their merchandise to Cincinnati, to the utmost extent of their control, and undersell our own citizens, from the very fact that they could hold their property and do business wholly exempt from taxation. A system of taxation so unfair and unjust in its operation as this, would never be tolerated by any intelligent community.

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It must be conceded to be exceedingly difficult, if not wholly impracticable, to devise any system of taxation which shall be perfect in the *equality* and *fairness* of all its burdens. But the principle adopted and established by the constitution is certainly the only one which admits of an approximation to such a standard. This provision requires *all property* of every description in the state, to be taxed by a *uniform rule* and *at its true value in money*, with the exception of certain enumerated exemptions, in favor of charity, religion, the burial of the dead, and the public interests, etc.

The language of the constitution is comprehensive and explicit in the requirement, that *all property* of every description, excepting only that which falls within the specified exemptions, should be taxed. The only exception or exemption allowed in favor of individuals, is to be found in the words, "*personal property to an amount not exceeding two hundred dollars in value, for each individual, may, by general laws, be exempted from taxation.*" It has ever been the humane policy of our laws to allow a certain amount of personal 14] *property, sufficient to include the most essential and necessary articles for the support of a family, to be exempt from execution for the payment of debts. And it is in accordance with this benevolent regard for the necessities of life, that this limited exemption from taxation, in favor of individuals, is authorized by the constitution. But the very fact of this express exemption, excludes the idea that any other or further exemption can be made. The language of the constitution authorizing the tax upon the property of individuals, is substantially as follows: *Laws shall be passed taxing all the property of every description, belonging to individuals, excepting that personal property, to an amount not exceeding two hundred dollars for each individual, may, by general laws, be exempted from taxation.* This imperative requirement of the constitution, that *all property* should be taxed, is not to be evaded by any circuitry or indirection. And to allow an individual, in furnishing the list of his property for taxation, to reduce the amount of his taxable property to an extent equal to the amount of his liabilities; or in other words, to deduct the amount of his liabilities from the amount of his taxable property, whether it consists of money and credits, or other property, would, in substance and effect, amount to the same thing as an express exemption from taxation, to the extent of such deduction.

It has been claimed that section second of the constitution above

recited, specifies two distinct classes of property, prescribing a different *mode* of taxation for each, and not *requiring* the same *rate* or *burden* to be assessed upon each. Thus, it is said, that moneys, credits, investments in bonds, stocks, joint stock companies, etc., are required to be taxed by a *uniform rule*; but that all other property, both personal and real, is required to be taxed at its *true value in money*. If this interpretation be correct, the great object of these constitutional provisions, which has been supposed to be equality and fairness in taxation, might be defeated; for it would permit a burden of taxation to be imposed upon a person *whose prop- [15 erty consisted of real estate, or some kind of personal property, infinitely greater than that which is imposed on a person whose property consists of moneys, credits, bonds, stocks, etc. But it is manifest, from the context and spirit of these provisions, that it was the intention of the constitution to provide an effectual barrier against a fruitful source of oppression and misrule, arising from inequalities in taxation, by putting an end to all legislative discretion as to *what* should be taxed, *what* should bear the heaviest burden of taxation, and *what* and *how much* should be exempted from taxation.

What is meant by the words, "*taxing by a uniform rule*?" And to *what* is the rule applied by the constitution? No language in the constitution, perhaps, is more important than this; and to accomplish the beneficial purposes intended, it is essential that they should be truly interpreted, and correctly applied. "*Taxing*" is required to be "*by a uniform rule*;" that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity, not only in the *rate* of taxation, but also uniformity in the *mode* of the assessment upon the taxable valuation. Uniformity in taxing, implies equality in the burden of taxation; and this equality of burden can not exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a state tax, it must be uniform over all the state; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the constitution, does not stop here. It must be extended to *all property* subject to taxation, so that all property may be taxed alike, equally—which is taxing by a uniform rule. The constitution of the United States (article 1, section 8),

provides, that "all duties, imposts, and excises, shall be *uniform* throughout the United States." The predicate of the uniformity [16] here required, is not the articles required *to be taxed, but the duties, imposts, and excises, which import of themselves, a tax upon specific articles of property. That rule of uniformity, therefore, forbids discriminations in duties, not as between different articles of property, but as to *localities*, requiring the same tax as between different places throughout the United States, upon the same specific article. But the rule of uniformity in taxation, required by our state constitution, has a direct reference to the things taxed—to all taxable property—and forbids discrimination in the burden upon the different subjects of taxation. "Laws shall be passed taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money," etc. No discriminations are allowed here to be made between the tax upon moneys and that upon credits; or between the tax upon credits and that upon stocks. All must be taxed by the same equal rule. There must be uniformity in the tax upon all the different articles of property, as well as uniformity in the tax upon each.

But it is argued that the uniform rule in taxing, required by the constitution, applies only to moneys, credits, investments in bonds, stocks, joint stock companies, etc. Why should so important a rule as that of uniformity in taxation, be established by the constitution, and then limited in its operation to a few specific classes of personal property? It is said that all other property is to be taxed "*according to its true value in money*." This requirement, however, only fixes the standard for ascertaining the taxable valuation, and does not necessarily imply equality and uniformity, either in the rate and mode of assessment, or in the different localities throughout the state. The taxable valuation may be fixed according to the true value of property in money, and yet discriminations be made between different classes of property, and between different localities in the state, imposing unequal and unjust burdens of taxation.

[17] *The language of the constitution is capable of a reasonable and consistent interpretation. The taxing power conferred, is coupled with a qualification or rule for its government. "Laws shall be passed, *taxing, by a uniform rule*, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also,"—what?—"taxing" (by the same rule, of course) "all real and

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personal property," etc. The implication carries with it the qualification annexed to the taxing power, expressed in the first clause of the sentence. If this had not been the case, the term "*taxing*" would have been repeated in the second clause, disconnected from the qualification attached it in the first clause, so as to read, "*and also, TAXING all real and personal property according to its true value in money.*"

The provision for taxing property "*according to its true value in money,*" in the second clause of the section, applies to all property, both real and personal, of every description, including the enumerated articles of moneys, credits, stocks, etc., mentioned in the first clause. The words "*all real and personal property,*" in their legal import, include everything which is the subject-matter of private property. It is true that several classes of personal property, consisting of moneys, credits, stocks, etc., are expressly mentioned in the first clause of the section; but this was inserted by way of precaution and certainty, and not with the view of giving them any new and distinctive character taking them out of the denomination of personal property. Some years ago, moneys, credits, investments in bonds, stocks, joint stock companies, etc., were not subject to taxation in this state; and there has been much controversy, not only as to the propriety, but also touching the right of taxing credits and investments in bonds, stocks, etc. To remove all question of doubt, therefore, on this subject, it was thought proper to require, by an express enumeration, that "all moneys, credits, investments in bonds, stocks, joint stock companies," etc., should be taxed. This provision, arising out of abundant *caution, was not intended [18 to give these enumerated things any new distinctive classification, nor does it in fact exclude them from the denomination of personal property, to which, by their nature and legal incidents, they belong.

Mr. Broom, in his "Selections of Legal Maxims," page 415, says: "That the maxim, *expressio unius est exclusio alterius*, requires always great caution in its application. Thus, where general words are used in a written instrument, it is necessary in the first instance to determine whether those general words are intended to include other matters beside such as are specifically mentioned, or to be referable exclusively to them; in which latter case only can the above maxim be properly applied." In the interpretation of legal instruments, words used out of abundant caution are often to be tolerated at the expense of tautology. The object of the language

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of the constitution under consideration was comprehension, not exclusion. The words, "*all real and personal property*," therefore, in the second clause of this second section, are to be taken in their most comprehensive legal import, including every kind of real and personal property whatsoever, *not excepting* the several classes of personal property expressly mentioned in the first clause of the section. If this interpretation be in any sense liable to the charge of tautology, it certainly is not to that of repugnancy. If this had not been the meaning intended by the constitution, there would have been added to the words "*all real and personal property*," these words: "*other than that above mentioned*." It is more in harmony with the settled rules of construction to convict the law-maker of some inelegancies in rhetoric, and the use of unnecessary words, than to depart from the leading object and intent of the instrument. This section of the constitution, therefore, would have expressed the same thing had the phraseology been as follows: "*Laws shall be passed taxing, by a uniform rule, all real and personal property, according to its true value in money, 'including all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise.'*"

19] *Any other interpretation than this would lead to consequences at variance with the manifest spirit and true intention of the constitution. If moneys, credits, investments in bonds, stocks, joint stock companies, etc., may be subjected to a different rate of taxation from that imposed on other kinds of property; or if moneys, credits, investment in bonds, stocks, etc., may be taxed at less than their true value in money, while all other property is required to be taxed at its true value; in either case, great and unfair inequalities may be created by legislative discretion. For example, a person owning property worth one hundred thousand dollars, consisting of moneys, credits, and investment in bonds, stocks, etc., might be taxed at the rate of ten per cent., while a person owning an equal amount of other kinds of property was required to pay a tax at the rate of two per cent.; or a person owning property of the value of one hundred thousand dollars in moneys, credits, and investment in bonds, stocks, etc., might be taxed at a uniform rate of taxation, but an unequal assessment on only fifty per cent. of its actual value, while all other property is taxed at its true value in money. In either case the inequality would be glaring and unjust. There can exist no sound reason why a person, whose property consists of moneys, credits, stocks,

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etc., should bear a less burden of taxation than that which is imposed on the lands and chattels of the agriculturist; the implements, machinery, and materials of the manufacturer; or the goods and wares of the merchant. And the constitution, truly interpreted, recognizes no such distinction.

By the tenth section of the law above recited, two classes of personal property, consisting of moneys and credits, are selected out; and in effect, favored by an exemption from taxation to the extent of the owner's liabilities. Moneys, and, to a great extent, credits, constitute the most productive form of property. Those who invest their capital in moneys and credits, and devote their attention to dealing in these *forms of property, generally make [20 large and certain profits. Why the attempt at a partial exemption of these two kinds of property from taxation, in violation of the plain language of the constitution, requiring laws to be passed taxing *all* moneys, credits, etc.? Special exemptions or advantages of this kind to favor any particular class of persons, or any particular branch of business, are at war with the spirit and fundamental principles of our government. Yet this discrimination is strenuously insisted on by persons who sincerely repudiate the policy of unequal and unjust legislation. The reason which has probably led to this mistaken and unconstitutional provision of law is founded in the peculiar nature of the property thus partially exempted from taxation. Money, *as such*, has no inherent or intrinsic value within itself other than its exchangeable value. Being the medium of exchange itself, it is the most convenient and certain means of obtaining articles of property which possess intrinsic value for use or consumption. The only legitimate and useful purpose of money, therefore, being that of exchange, it is constantly passing from one person to another. A person may have a thousand dollars on hand on the day on which the assessor obtains the list of his property for taxation, and on the next day be required to pay it out on his liabilities, and not again during the year have on hand at any one time money to the amount of one hundred dollars. Again, a person may, in carrying on a particular branch of business, have on hand money to an amount exceeding one thousand dollars almost constantly during the year, and on the day before the assessor calls for his tax list, have even ten thousand dollars; but on that day pay it out in the payment of debts, or otherwise, and on the following day, when his list of

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property is furnished to the assessor, have no money whatever for taxation.

Property in credits, in regard to its nature and character, is 21] somewhat similar to money. Many of the forms of credits *are passing daily from hand to hand, and in the exchange of property, performing some of the functions of money. The amount of the credits of persons engaged in business, vary largely from day to day. So that the amount of a person's credits on the day on which the assessor calls for the tax list, may be no indication of the amount of his credits generally during the year.

These peculiarities in moneys and credits, which may have led to the unwarranted provision allowing a partial exemption by the deduction of liabilities, indicate rather the propriety of a provision for ascertaining the taxable valuation of moneys and credits, by an average value or amount during the year, after the mode of listing and valuing the stock in trade of the merchant, the manufacturer, or the exchange broker. This is peculiarly the case in regard to the listing and valuation of the moneys and credits of the merchant, whose stock in trade is taxed by an average valuation. For example, a merchant engages in business on an investment of twenty thousand dollars in goods, and in the progress of his sales, he converts his goods into moneys and credits, so that at the end of three months he has reduced his stock of goods to ten thousand dollars; and has, for his sales five thousand dollars in money, and five thousand dollars in credits. He collects his credits, and from time to time during the year, reinvests his money and the proceeds of his credits so as to keep up an average of fifteen thousand dollars worth of goods during the year. But at the end of the year, when the assessor calls upon him for the list of his taxable property, his stock of goods is reduced to the amount of ten thousand dollars, but the amount of his moneys and credits increased to ten thousand dollars. This law would subject him to a tax upon fifteen thousand dollars valuation of stock in trade, and ten thousand dollars valuation in moneys and credits, making five thousand dollars over and above his investment at any one period.

22] *Although the taxable valuation of the moneys and credits of the merchant, and perhaps, of the moneys and credits of every other person, should be ascertained by an average for the year, yet the rule for estimating the taxable valuation is left, by the constitution, to legislative discretion. The rule of taxation is prescribed

by the constitution; but the mode of ascertaining the value of property is regulated by law. The fact, therefore, that the taxable valuation of moneys and credits, is obtained by an estimate of the amount on hand at the time the tax list is called for, instead of an application of the rule of making an average for the year, does not conflict with the constitution.

It has been argued that "*stock in trade*" is subject to a different rule of taxation from that which is imposed on other property. This is a mistake. The difference consists, not in the *rule or burden* of taxation, but simply in the *mode* of ascertaining the valuation. The principle of valuing by an average has been introduced because stock in trade is constantly changing the article of its investment, and varying in the quantity on hand, from month to month.

The constitution places "moneys and credits" on precisely the same footing, and subject to the same rule, as a basis of taxation, with all other taxable property, real and personal. Upon what principle, not applicable to other taxable property, can the amount of "moneys and credits," as a basis of taxation, be reduced and exempted from taxation to the extent of the owner's liabilities? A person who has \$5,000 of money on hand, and \$5,000 more invested in notes and obligations, is certainly as able to pay his taxes as a person whose property consists of a farm worth \$5,000, and cattle, horses and other live stock, worth \$5,000. The former, as a general thing, makes larger profits than the latter, and calls most frequently for the aid of the government to protect and enforce his rights.

The practical operation of the deduction allowed by the tenth section of the law, exhibits an inequality and unfairness *wholly [23] inconsistent with the spirit and evident intent of the constitution. The following supposed cases illustrate the principle of its operation: A has a capital of twenty thousand dollars, consisting of five thousand dollars in money, and fifteen thousand dollars in notes, bills of exchange, and other credits; and carries on a profitable business in dealing in moneys, credits, etc.; but he is indebted to sundry persons in the aggregate amount of twenty thousand dollars. B has capital invested in goods, wares, and merchandise to the amount of twenty thousand dollars, and carries on the business of a merchant; but he is indebted to the amount of twenty thousand dollars. C owns property to the amount of twenty thousand dollars, consisting of a farm worth five thousand dollars, cattle and

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horses worth five thousand dollars, and ten thousand dollars invested in machinery, materials, etc., employed in manufacturing; but he is indebted to sundry persons in the aggregate amount of twenty thousand dollars. Under the operation of this law, if the tenth section be valid, A would avoid all taxation, while B and C would each be compelled to pay a tax on twenty thousand dollars' worth of property. Why should moneys, the most convertible and advantageous form of property, be favored by a partial indirect exemption, while real estate and investments in articles of merchandise, and in property employed in mechanical and manufacturing business, are taxed to the full extent of their value? No satisfactory reason can be assigned for this inequality. Moneys and credits, more than all the other kinds of property, call for the protection and aid of the government in securing and enforcing the rights of property pertaining thereto. More than one-half of all the litigation in the state, which occupies the time of our courts of justice, relate to these two favored classes of property.

It must be conceded, that this tenth section is wholly indefensible, so far as it provides for the deduction of liabilities from "*moneys*." 24] But it is said, that there is something peculiar *in the nature of *credits*; that the credits belonging to a person do not constitute substantial property, except so far as the gross amount of his credits exceeds the gross amount of his liabilities; and that beyond this, it was not intended by the constitution to make credits the basis of taxation. Had the principle of taxation adopted been that of taxing each person, not upon all the property he owned, but upon the amount he is worth, over and above his liabilities, there might have been some foundation for this position. But as it is, the constitution makes no such distinction as that above mentioned, in regard to the taxable amount of a person's credits, but requires all credits to be taxed by a uniform rule with other property, at their true value in money.

In legal parlance, and in the sense in which the term is used in the constitution, credits are *choses in action*—things *incorporeal*, consisting in the right of one person to demand and recover from another, a sum of money or other things in possession. The value of a credit grows out of the right to have and receive property in possession, either by a sale and transfer of the claim to another person in exchange for money or other things, or by requiring or enforcing payment from the debtor. Credits, therefore, although

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fictitious, nevertheless constitute property—substantial, convertible, and productive property. Money is invested in credits for profit, and credits are given in exchange on the sale of property of all kinds, real and personal. If A holds a credit or obligation against B, it is not any the less valuable as property, because A may be indebted to C; and if A collect the amount of his claim against B, and apply the proceeds to the payment of his indebtedness to C, it amounts to the same thing, and is fully as valuable to him as if he had sold a tract of his land, and made the same application of the proceeds of the sale. If a person hold good obligations against sundry persons, of the aggregate value of ten thousand dollars, and be indebted to sundry other persons to the amount of ten thousand dollars, the fact of such indebtedness can neither *lessen the amount nor the value of his obligations against others. [25 The indebtedness being to persons, other than those whose obligations he holds, could not be set off or otherwise lessen the value of his credits. A person's indebtedness constitutes no charge upon the credits which he holds against others, any more than it does upon any of his other property, real or personal. The constitution requires *all credits*, as well as "*all moneys*," etc., to be taxed. And, with deference to the opinion of others, I must confess myself wholly unable to comprehend the ground on which it has been claimed that the taxable credits of a person consist simply of the excess (if any) of the aggregate amount of his choses in action over and above the gross amount of his liabilities.

In estimating the taxable valuation of credits, they are not to be taken at their nominal amount, but like the valuation of other property, every circumstance affecting in any manner their value should be taken into consideration. If the debtor be wholly insolvent, the credit is of no value, and therefore has no basis for taxation. If the debtor be in doubtful or failing circumstances, if the claims be disputed, contested, or involved in litigation, or if any defense by way of payment, or otherwise, either in whole or in part, against the claim, be known to exist, it should be considered, and all proper allowances made, in estimating its taxable valuation. The actual value in money of credits thus ascertained, constitutes as proper a basis for taxation, as that of any other kind of property. To say that if a person be thus taxed upon his credits, that is, upon his claims, which he holds against other persons, with-

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out deduction, he is not taxed upon his *property*, but upon his *indebtedness*, is, to say the least of it, a most glaring absurdity.

Investments in bonds, notes, and all the various forms of credits, produce their *profits* in the form of *interest, without labor*. Money itself on hand, is dead and unproductive capital; but invested in credits it becomes productive, and that, too, without the labor of the owner. The goods and wares of the merchant require his unre-
26] mitting care and labor to *make them profitable; a farm, with all its implements and stock, would be wholly unproductive without the unceasing toil of the agriculturist; and the materials, machinery, etc., of the mechanic and the manufacturer are made productive only by their being accompanied with the labor of the operatives. A tax upon all those classes of property which derive their productiveness from labor, is, to some extent, a tax upon *labor*. But a tax upon *credits* is a tax upon *capital* alone, in its most productive form, unmingled with labor. To exempt credits from taxation, and throw the *whole burden* upon those forms of property which derive their productiveness from labor, would afford a most unfair and unjust advantage to capital over labor, oppressive in its consequences to the productive interests of the country.

It is alleged that the taxation of credits results in a double taxation; that a credit is the mere representative, the mere shadow of the property in possession, which it requires in payment; and that to tax both the credit and the property which it is said to represent, is double taxation. This is a fallacy. The value of a credit is not identical with the property which it would require to discharge it; but its value consists in the right of the creditor to require payment, and the obligation and ability of the debtor to pay. A valid credit against a responsible person, therefore, is not a mere shadow, but property possessing intrinsic value within itself. A sells his farm to B, at the price of ten thousand dollars, and takes B's notes for the amount, with a mortgage on the farm for security. B will pay a tax on the full value the farm, without deduction, and A will be very properly required to pay a tax on the full value of the credits against B, which he may choose to hold for many years, being paid interest thereon. The credits which A holds are profitable, valuable of themselves, transferable at any time in exchange for other property, and the means with which they may be ultimately paid, may be acquired by B many years after the notes are
27] given. These credits, therefore, are not mere shadows; *are

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not substantially identical with the property in which they are payable, or with which they may be ultimately paid; but they are valuable, and possess the inherent elements of property.

Again, C sells to D a stock of goods of the value of ten thousand dollars, and takes D's notes for the amount. D will be taxed upon the full value of the goods, and C upon the full value of the notes.

And again, E has ten thousand dollars in money, which he delivers over on general deposit to F, a banker, and takes a certificate of deposit therefor. E will be taxed on the credit, evidenced by the certificate of deposit, and F will be taxed on the money, which, by the deposit, passed absolutely to his dominion and became his property, to use and control for his own purposes. Here F is not the holder of E's money, but stands indebted to E for the amount of the money which passed and became F's property. It is well settled, that the right of property follows the dominion over it; and that in all cases of a mutuum or deposit, where the mutuary or depositary has the option to return either the same identical article, or the same amount in kind, the right of property passes with the control over it, and the mutuary or depositary is indebted to the lender or depositor for the amount. *Chase v. Washburn*, 1 Ohio St. 244.

In neither of these supposed cases is there any such thing as double taxation. In each of these instances each person is taxed on the actual property and value which he holds and owns in his own right. The arguments urged against this position are accompanied with strong complaints of grievous and oppressive taxation. These complaints may have just foundation, but the remedy is not by relieving one class of taxable property, and consequently throwing a proportionably greater burden on the other property in the state, but by retrenching the *unnecessary* sources of public expenditure, and reducing the expenses of the government to the only *true, essential, and legitimate* purposes for which it was constituted.

*It has been urged, that taxing moneys and credits, creates [28 double taxation in another form; that it causes the merchant to be taxed first upon the value of his property in goods, and afterward upon the same property converted into moneys and credits; and that it causes the manufacturer to be taxed, first upon his property in the raw material, afterward upon a part of the same

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property in the manufactured article; and again, upon a part of the same valuation converted by sales into moneys and credits. This is a flagrant error. And it arises not from a misconstruction of the law, but from a want of a knowledge of its provisions. There is nothing in this law requiring the same taxable valuation, whatever may be the mutations of the property in form, to be taxed more than once during the same year. The taxable property of every person is taken at his own listing under oath. And so far as the merchant's stock of goods is reduced during the year, either by sales converting his goods into moneys and credits, or otherwise, so far he has the right, in listing the average amount of his stock in trade, to reduce the taxable valuation of his goods. In other words, in returning the average valuation of his stock in trade, the merchant is only required to take into the account, the amount of his goods in hand, making just allowance for that proportion of his goods which has been converted into moneys and credits. So it is with the manufacturer. In returning his raw material, he only takes into account the quantity actually on hand, making deductions of course for that which was consumed; and in returning the amount of his manufactured articles, he estimates only the average amount actually on hand during the year; so that it would require the addition of the average amount of the moneys and credits received on sales during the year, to make up the full amount of his property invested in his business.

Upon this exposition of the statute, the question recurs, whether the validity of the tax imposed on property employed in banking 29] is affected by the unconstitutional provision *of the tenth section, and if so, to what extent, and in what manner.

The third section of the twelfth article of the constitution heretofore recited, provides that all property, effects, or dues of every description of *all banks*, and of *all bankers*, shall be taxed *without deduction*. There has been much controversy as to the true interpretation of this provision of the constitution. The section of the constitution immediately preceding this third section provides for taxing *all property* of every form and description, excepting the subjects of the few specified exemptions; and it has been said that there could have been no object whatever in the third section, unless it was to tax banks and bankers in a different mode, or upon a different principle, from that which was applicable to other persons. I am inclined to the opinion, however, that the history of the legislation

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of the state on the subject of taxation for some years prior to the adoption of the constitution, as well as the circumstances attending its formation, very plainly indicate the purpose of this third section. Not only the *policy*, but also the *right* of taxing *capital* employed in banking, had been strenuously contested, and to a considerable extent successfully resisted. There had also been much controversy as to the form of property employed in banking which should constitute a basis of taxation. With a view therefore of putting an end to the controversy on this subject, and of defining with certainty the form in which property in this branch of business should be made a basis for taxation, this third section was inserted in the constitution.

Much criticism has been spent on the requirement that all property employed in banking should be taxed "*without deduction*." This provision could not, by implication, confer a right on other persons to make deductions which are excluded by the direct language of the second section. The third section must be construed in its connection with the second section. The latter provides that laws shall be passed taxing *all property*, in general and comprehensive language; and this language is followed by a few specified limitations, by way of special exemptions, among which is the [30 exemption of personal property to an amount not exceeding two hundred dollars in value for each individual. This confers legislative authority to allow each individual, in furnishing the tax list of his personal property, to deduct therefrom an amount not exceeding two hundred dollars. And this is the only exemption authorizing deductions to be made in favor of individuals. The third section, coming immediately after this provision, requires all property employed in banking to be taxed "*without deduction*." The deduction here inhibited amounts simply to an express denial to the banks of the deduction allowed in the preceding section by the exemption in favor of individuals, and has reference to it. With deference to the opinions of others to the contrary, I am unable to give any other interpretation to the language employed, which appears to me to be reasonable, and to harmonize with the other provisions of the constitution. In specifying the property which shall constitute the basis of taxation, an *exemption* and a *deduction* amount substantially to the same thing.

I can not perceive any necessity for the words, "*without deduction*," in the third section, with reference to the circulation of the

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banks. By special authority a bank is permitted to use its own notes or bills as money, and to pay them out and derive the same benefit from their issue which it would from an equal amount of gold or silver coin. The circulation of a bank is a source of actual wealth to it; and inasmuch as the second section of the constitution does not permit individuals to deduct their liabilities from any of their property, I can not see how the prohibition of deductions by banks could have been deemed necessary with reference to their liability to redeem their circulation, when individuals were not allowed to deduct their liabilities on the obligations outstanding against them.

The reason for the exemption of a small amount of property for each individual which has been heretofore alluded to, does not apply to the tax upon banks and bankers. That is a tax upon persons in a special character, employing the property taxed in a business especially authorized by the state, and in which other persons are not allowed to engage. *Banking powers* are not exercised by any person in his individual capacity. It appears from the seventh section of the thirteenth article of the constitution, that this special authority is conferred only on *associations* of persons, whether incorporated or not. Every individual, however, engaged in a banking association has the full benefit of the provision for the two hundred dollars exemption, in regard to the property held by him in his separate and individual capacity. And therefore banking associations are required to be taxed upon their property employed in their *special* and *exclusive* business, without any deduction or exemption, such as is allowed to individuals out of regard to the necessities of life.

It has been urged that the term "*bankers*," used in the third section, was intended to bring within the operation of this section the private banker and exchange broker, persons carrying on business which is open and common to all, not requiring special statutory authority in any of its departments. The business of banking, in its most enlarged signification, includes the business of receiving deposits, loaning money, and dealing in coin, bills of exchange, etc., besides that of issuing paper money. None of this business has ever required any special authority, except that of issuing notes and bills to circulate as money. The banks created by the authority of law are those which, in addition to the ordinary business of banking common for all persons to engage in, make and issue their paper

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to circulate as money, which are termed banks of circulation. By a long course of legislation in this state, the business of banking has acquired a restricted legal signification, applying only to those banks which exercise the functions of issuing paper money. Such is the way in which the terms *bank* and *banking* have been used in the statutes of the state, with very few exceptions, since 1816; and such is the meaning given to them by the constitution, *as is [32 apparent from the seventh section of the thirteenth article, which is in these words:

"No act of the general assembly, authorizing *associations* with *banking powers*, shall take effect until it shall have been submitted to the people at the general election next succeeding the passage thereof, and be approved by a majority of all the electors voting at such an election."

No other but paper-money banking ever sought statutory authority. And property employed in this kind of banking, for many years, was subject to a mere nominal tax, and was claimed to be exempt from any further exercise of the taxing power. But there never was any question made as to the right of the state to tax the property of the private banker and exchange broker who claimed no special privileges or exemptions. There could have been no object, therefore, in a special provision of the constitution to reach them. The business of the private banker and broker is one which may be carried on by any one in his individual capacity. And the very fact that the burden of taxation on the property of individuals is made the *standard* by which to fix the burden of the tax upon banks and bankers, is conclusive, to my mind, that the property employed in banking, here provided for, is a tax upon banks and bankers in their specially-authorized character. With all proper deference for the opinions of others to the contrary, I have been unable to reach any other conclusion myself than that the third section of the constitution, above mentioned, has reference to taxing property employed in banking carried on by banks of circulation, and not by private bankers and exchange brokers. The expression "*all banks and all bankers*" is very properly used in the constitution. The term "*banks*" denotes the incorporated institution, and the term "*bankers*" the unincorporated associations exercising "*banking powers*." It appears from the above-recited seventh section of the constitution that an act of incorporation was not

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deemed essential to the exercise of "banking powers;" hence the expression "*associations with banking powers*," which will apply to 33] associations of *joint partners with *banking powers*, as well as incorporated associations.

It is provided that all property employed in banking shall be so taxed, as always to bear a *burden* of taxation equal to that imposed on the property of individuals. This is not a mere corollary from the requirement, that all property of every description of "all banks and of all bankers," should be taxed; but it is prescribed as a *rule of taxation*. The *burden* of taxation here mentioned is not merely the rate of taxation. It expresses much more. It has reference to the actual value of all the taxable property of the person taxed, and comprehends the proportion which the tax assessed bears to the actual value of all his taxable property. So that it is required that the amount of the tax upon all property employed in banking shall bear a proportion to the actual value of the property, equal—not less, not greater, but equal—to the proportion which the amount of the tax imposed on individuals shall bear to the actual value of all their taxable property; that is, to the actual value of all their property, real and personal, after the deduction of the amount of the exemption allowed, not exceeding two hundred dollars for each individual. The constitution requires that *all* the property of every description owned by individuals (except that which falls within the specified exemption) should be taxed by a uniform rule, and at its actual value in money; and the *burden* of the tax thus imposed on the property of individuals is made the *standard* to which the *burden* of the tax upon property employed in banking is required to conform. This is the equality and fairness in taxation required by the constitution. And a statutory provision which allows a part of the *taxable* property of all persons not exercising banking powers to be exempt from taxation, diminishes the aggregate basis of taxation, and consequently throws a proportionably greater burden of taxation on property employed in banking than is imposed on individuals having the benefit of the exemption, and greater than is authorized by the constitution. The tenth section of the tax law, therefore, is un-34] constitutional *and void; first, because it provides in effect for an exemption of a large amount of property from taxation which the constitution requires to be taxed; and, second, because, by an unwarrantable deduction from the taxable property of per-

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sons not exercising banking powers, it results in the imposition of a burden of taxation on property employed in banking, greater than that which is imposed on the property of individuals.

Where a provision in a statute is of such a nature, and has such a connection with the other parts of the statute as to be essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connection essential to the other parts of the statute, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid. In the instance before us, the tenth section of the tax law contains a separate, distinct, and independent provision. The fourth, fifth, sixth, and seventh sections provide the authority for listing all property for taxation, and prescribe by whom, where, and in what manner property shall be listed for taxation, expressly including moneys and credits; and the ninth section prescribes the rules for the valuation of the property listed. Ample authority, therefore, exists for listing property without the tenth section. So that the tenth section was inserted for no other purpose than to allow deductions of liabilities from moneys and credits. Strike out this section, and the balance of the statute is perfect as an enactment, and provides complete authority for listing property for taxation, expressly including all moneys and credits. The tenth section of the law, therefore, must be rejected as void, and should be wholly disregarded, leaving the other parts of the statute to stand as valid and binding law.

The question arises here, whether the unconstitutionality of this tenth section of the law invalidates the assessment of taxes, which is the subject-matter of complaint in this case. If this assessment upon the complainant's property be void, upon this ground, the whole assessment throughout the state for the year 1852, [35 must be void upon the same ground. And if those who have resisted its payment, be entitled to be relieved from the assessment, those who have already paid, should, in justice, have the amount reimbursed to them by the state; and no revenue for that year could justly and legally have been paid into the public treasury. But what was the effect of the provision in the tenth section of the law, upon the validity of the assessment? This provision relates only to the *mode* of listing property for taxation, allowing a certain portion of the taxable moneys and credits to be left off the tax list and consequently omitted on the duplicate for taxation. Regard-

ing this provision as unconstitutional and void, if any moneys or credits were left off the tax list by means of it, they were improperly and wrongfully omitted; and the county auditor had ample authority, by virtue of the forty-sixth section of the law, to correct any such omission or erroneous return by any assessor. And should the county auditor have failed to perform his duty in this respect, there still existed a remedy by bringing the matter before the county board of equalization, at its annual meeting, or by an appeal to the auditor of state—and the performance of this duty could be enforced by the writ of mandamus. The law, therefore, having prescribed a mode for the correction of errors and omissions in the listing of property for taxation, the person who neglects to avail himself of the remedy thus prescribed, must be taken to have waived any objection to the assessment, so far as his own property is affected thereby. Errors and omissions will no doubt exist to some extent in the tax list of every year; and if this could be made a ground for invalidating and setting aside the whole assessment, it would become the means of defeating the collection of all taxes; thereby greatly embarrassing the public authorities, and tending to the subversion of the government itself. No such remedy would be admissible. Besides, there is no allegation in the bill, that there has been any error or omission in the tax list, or that any particular 36] person or persons have been allowed to withhold *their moneys and credits, or any part of them from the tax list. The returns of the assessors do not show that any moneys and credits have been deducted from liabilities, and thereby omitted on the lists of taxable property. And from aught that appears, either from the averments in the bill, or otherwise, in this case, the officers engaged in the execution of this law may have had a correct understanding of their official duties, and, in obedience to their oaths to support the constitution, disregarded the void provision of the tenth section of the law, and listed moneys and credits without the unwarranted deduction on account of liabilities.

A question has been made in this case, touching the jurisdiction of a court of equity to interpose its extraordinary powers by injunction, in the case presented by the complainant. The bill seeks relief against an alleged threatened trespass, and avers the defendant's pecuniary inability to respond in adequate damages. If the law under which the defendant is about to proceed, be wholly unconstitutional and void, as is alleged in the bill, the defendant would

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be liable to damages in an action at law, to the extent of the injury which might be done to the complainant by the threatened wrong. Equitable relief by injunction against a tort, rests wholly upon the inadequacy of the remedy at law. It is well settled, that a court of chancery will not interfere by injunction to prevent a simple trespass, susceptible of compensation in damages in a proceeding at law, whether about to be committed in the pretended collection of a tax or otherwise; and to authorize the interference of this extraordinary power, there must be a case of apparent imminent danger of great and irreparable damage, for which an action at law would not furnish full indemnity. *Mechanics' and Traders' Bank v. Debolt*, 1 Ohio St. 591.

To bring this case within the principle of equitable relief, by injunction, it is alleged in the bill that the defendant is a person of insufficient pecuniary ability to respond in adequate damages for the wrong. This ground of equitable relief is obviated and removed by a statutory provision. It is provided by the thirteenth [37] section of the statute of the 14th of March, 1853, entitled "an act to enforce the collection of taxes which now are, or may hereafter be due from banks," etc., that any county treasurer shall be allowed, and paid out of the county treasury, not only reasonable counsel fees and other expenses incurred, but also all damages and costs which may be adjudged against him in any action at law or suit in chancery for performing or attempting to perform his duty in the collection of the public revenue. The right to this indemnity accrues to the public officer on the recovery against him; and should he be irresponsible otherwise, this claim upon the public treasury, could be reached under legal process by the person recovering the damages. And besides this, where a public officer, under a mistake, and without competent authority, enforces the collection of the public revenue, and pays the same into the treasury, the person injured, after a recovery in damages, would have a strong equity to follow the fund in the hands of the public authorities; and a proper sense of justice on the part of the government would require the money thus wrongfully received to be refunded. In such a case, therefore, it can not be alleged of the public officer that he is a person of insufficient ability to respond in damages in a proceeding at law, so as to lay a foundation for relief by injunction in a court of equity.

The injunction must be dissolved and the bill dismissed.

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THURMAN, J. The importance of the questions involved in this case, induces me to state, in my own language, the grounds upon which I concur in the decision just pronounced. These questions are as follows:

I. Are the 19th and 20th sections of the tax law of April 13, 1852 (50 Ohio L. 144, 145), which sections provide for the taxation of banks, in accordance with the constitution of the state?

II. Is the 10th section of the same act, which permits individuals 38] not engaged in banking, and corporations not exercising *banking privileges, to deduct, when giving their tax lists, their liabilities from the amount of their moneys and credits, unconstitutional?

III. If it is unconstitutional, may it be treated as void without affecting the validity of the remainder of the act?

IV. If these questions be answered in the affirmative, is a case presented, entitling the claimant to the relief it seeks, namely a perpetual injunction against the collection of the tax assessed against it?

I will consider these questions in the order I have stated them.

I. Are the 19th and 20th sections aforesaid in accordance with the constitution of the state?

They are certainly in accordance with its letter, and for reasons that I will give under another head, they are, in my judgment, strictly consistent with its spirit. Indeed, this is not denied by complainant's counsel. Their argument is not that the basis of bank taxation, as prescribed in sections 19 and 20, is wrong, but that the burden of taxation upon the banks is improperly increased by the deductions allowed by section 10. This brings us to the next question.

II. Is section 10 unconstitutional? That section is in these words:

"Sec. 10. In making up the amount of moneys and credits which any person is required to list for himself or any other person, company, or corporation, he shall be entitled to deduct from the gross amount of moneys and credits, the amount of all *bona fide* debts owing by such person, company, or corporation, to any other person, company, or corporation, for a consideration received; but no acknowledgment of indebtedness, not founded on actual consideration, believed, when received, to have been adequate, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the meaning of this section; and so much only of any liability, as surety for others, shall be deducted, as the person making out the statement believes the surety is legally and equitably bound to pay; and so much only as

he believes such surety will be compelled to pay, on account of the inability or insolvency of the principal debtor; and if there are other sureties who are able to contribute, then only so much as the surety in whose behalf the statement is made will be bound to contribute; provided, that nothing in this section shall be so construed as to apply to any bank, company, or corporation exercising banking powers or privileges."

*This section is impugned on the ground that the deductions [39] it permits are forbidden by the constitution. The provisions of the constitution that bear upon the question are sections 2 and 3 of article 12, and section 4 of article 13. By the first of these sections it is ordained that,

"Laws shall be passed, taxing, *by a uniform rule*, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and, also, all real and personal property according to its true value in money; but burying-grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property, so exempted, shall, from time to time, be ascertained and published as may be directed by law."

It can not be denied that the letter of this section requires *all* moneys and credits to be taxed. No part of them, or of either of them, can be exempted, if we follow the plain, unambiguous language of the section. It can not be done by a direct exemption, by name, nor by an indirect exemption, under the name of deductions. The one is as much a violation of the letter of the section as the other. Even the two hundred dollars' exemption, authorized by the section, can not be of moneys or credits. It is confined to "personal property," and although "personal property," in legal signification, includes moneys and credits, it is apparent that whenever it is employed in this section it is used in a limited sense and does not include them. It is only necessary to read the section to see that this statement is correct. There is just as much reason for saying that a man may deduct his debts from his real or personal property, as to say that he may do so from his moneys and credits. The language that requires all real and personal property to be

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taxed, with certain exceptions, is no more stringent, no more comprehensive or explicit, than that requiring all moneys and credits to be taxed.

It is argued, however, that there is a distinction. It is said that a man's real and personal property is property in possession, that 40] his credits are only choses in action, and *that if the law tax him on all that he is entitled to receive on these choses in action after the payment of his debts, he is taxed upon all his credits. With great respect for those who advance this argument, I must say that it seems to me wholly untenable. I find no warrant for it either in the constitution or in reason. There is not a word in the constitution that makes any difference in regard to taxation between property in possession and rights in action, except that certain limited exemptions of the former are allowed, while no exemption of the latter is permitted. Nor is it true that in legal signification, or in popular parlance, the term "credits" means what is due to a man after deducting his liabilities. His claim may be upon one man, his liabilities to another; and even in the case of mutual credits, there may be no right of set-off, for one may be due at one time, and the other at another. The idea of the constitution is not that each man shall be taxed upon exactly what he is worth. That is a favorite idea with some political economists, but it finds no place in our constitution. The objects of taxation, declared in that instrument, are the real and personal property and choses in action in the state. The latter are considered for purposes of taxation as much property as the former. They are considered as much in the possession of the tax-payers as the former. They are to be taxed by the same uniform rule; taxed at their true value in money; taxed at the same rate as other property.

But it has been suggested that this construction requires every chose in action to be listed at the amount due upon it, although it may be worth but half that sum, or may, indeed, be wholly worthless. There is no foundation whatever for this suggestion; but if there were, the same thing might, with equal truth, be said, were section 10 sustained. For it is not by a deduction of his liabilities that a person escapes taxation upon a chose in action that is worthless, or is taxed upon the actual value alone of his claim. He may owe nothing whatever, and therefore have nothing to deduct; yet he is not 41] bound to list a worthless note; for being worthless, *it is not, in reality, a "credit," if indeed it is so even in name. Besides, it

would not be a strained construction, but, on the contrary, would be in exact conformity to the spirit of the instrument, to say that the word "its," in the sentence "according to its true value in money," in section 2 of the constitution, refers to each of the objects of taxation, previously enumerated, to choses in action as well as to real and personal property; and that the sentence should be construed as if it read "according to their true value in money."

But if the distinction sought to be established could be drawn between property and credits, what ground is there for any distinction between money and other property? Money is not a chose in action. It is property in possession of its owner, as much so as is his realty. Why, then, shall his debts be deducted from his money? Will it be said that a man has no money except what remains after the payment of his liabilities? The proposition is a contradiction in terms. And there would be just as much truth in saying that he has no lands or goods except what would remain after their application to pay his debts. His lands and goods are as much bound for the payment of his obligations as his money. Their application to that object can be enforced as readily—nay, more so—than can be the appropriation of his money. His money is so securely his own that no lien can be acquired upon it in his hands, while his lands and chattels may become bound for his debts in various ways. I find it altogether impossible to conceive any reason why there may be a deduction from money that would not equally favor a deduction from land. I find no argument that seems to me more than plausible to admit deductions from either. The constitution declares, in express terms, that laws shall be passed taxing "all moneys." Instead of this, we have a law that taxes only so much of a man's money as remains after deducting his liabilities. His money is in his possession, his debts may not become due for years, yet they are to be deducted. He may never apply a cent of his money to discharge *them; they may, in [42 fact, never be discharged; yet, by this process of deduction, his money escapes all taxation.

But not only is there nothing in the constitution expressly authorizing the deductions in question, but all its implications are against them; for it enumerates what may be exempted, and these deductions are not in the enumeration. The familiar maxim, *expressio unius est exclusio alterius*, has as direct an application here as in any case that can be conceived. I am aware that it is

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argued that the exemptions mentioned in section 2 are not deductions. It is said that the idea of the constitution is, that the law may exempt certain specific articles, not exceeding two hundred dollars in value (as, for instance, a horse, a cow, etc.), from taxation, and that it does not contemplate the deduction of \$200, or any sum, from the gross amount of a man's personal property. But the legislature have not so construed it; for, in this very tax law, they permit just such a \$200 deduction. And I think their construction, in this particular, right. The leading idea of the constitution is equality; that government should do by one man as it does by every other. Now, this equality would, in practice, be destroyed if the \$200 exemption were of specific articles. What shall they be? Shall a horse be one of them? Then every person who has no horse loses the benefit of the exemption, and so of any other specific article that might be exempted. The only fair mode, the only mode consistent, as I think, with the spirit of the constitution, is not to exempt specific articles, but to deduct the \$200, or any less sum that may be fixed, from the gross amount of personal property. And I find nothing in the language of the constitution that forbids this.

But what is this argument I am considering but a mere change of words? Is there anything of substance in it? What is the practical effect of allowing the deductions permitted by section 10? Plainly, to *exempt* just so much of the moneys and credits in the state from taxation. An individual has \$1,000 in money, and owes \$600. He is taxed, according to section 10, upon only \$400 of his 43] money. The residue *is *exempted* from taxation. If this can be done by merely calling an exemption a deduction, I know not where we are to stop. I do n't know what construction will ultimately be given to the various provisions of the constitution, if what is plainly inadmissible when called by one name is perfectly lawful when called by another. It is the thing itself, I imagine, and not the name it bears, that determines its validity or invalidity.

But if there is any doubt as to the construction of section 2, it is wholly removed, it seems to me, by the other sections to which I have referred. In regard to taxation, equality is the great idea of the constitution. Inequality was the pre-existing evil. Equality is the remedy. Thus, section 2 requires *all* property (I use the word here in its broad sense), burying-grounds, certain property devoted to religious, charitable, and public uses, and \$200 of per-

sonal property excepted, to be taxed. It is to be taxed *at its true value in money, and by a uniform rule*. There is to be no false valuation, no rule that exempts some property and casts the burden of government upon the rest; no different rates of taxation upon different kinds of property in the same locality. Such is section 2. All is uniformity, all equality. But lest this section might be construed to relate to individuals alone, we have it declared in section 3 of the same article, that "all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals;" and, again, in section 4 of article 13, that "the property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."

But let us examine more particularly the provisions of section 3, for it is upon this section that the advocates of the law mainly rely. In their judgment, it establishes a rule of taxation for banks and bankers different from that governing individuals otherwise employed. The section is in these words :

*" SEC. 3. The general assembly shall provide by law for tax- [44
ing the notes or bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description (without deduction), of all banks now existing, or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals."

Now, if equality of taxation is meant to be secured by the constitution, it follows that one of two constructions must be given to this section, for there are but two constructions that will attain that object. First: if it be held that individuals may deduct their debts, as provided in section 10 of the tax law, then it must also be held that banks and bankers may do likewise; otherwise there is no equality. Hence, it has been suggested that section 3 only means to *enumerate* the objects of taxation belonging to a bank, or banker, in the same way that the objects of taxation are enumerated in section 2, and that the words, "without deduction," in section 3, are used as synonymous with the words, "without exception." That the true reading is, that all notes or bills discounted or purchased, moneys loaned, and all other property, effects, or dues, *without exception*, of every bank and banker, shall be taxed, etc.; by

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which reading the section would be no more stringent than section 2, which requires all moneys, cerdits, etc., to be taxed; and hence if deductions can be made under one section, they can under the other. But this construction seems to me inadmissible. First, because I do not think that the deduction in question can be made under section 2. Secondly, because the words, "without deduction" are not synonymous with the words, "without exception." And thirdly, because this construction would permit the banks to deduct their circulation, which I can not believe was ever intended.

The other construction that secures equality, is that given to the constitution by the majority of the court, which forbids all deductions, or exemptions, except those specified in section 2.

The advocates of the law say that banks and bankers can make 45] no deductions, that to allow them to do so would violate *section 3, which forbids deductions. So say we; but this fact, instead of supporting section 10 of the law is fatal to it. For this same section of the constitution declares that the objects of taxation belonging to banks and bankers shall be taxed, "so that all property employed in banking shall always bear a burden of taxation *equal* to that imposed on the property of individuals." The burden is to be not less, not greater, but equal. Now it can not be equal if individuals may deduct their liabilities from their moneys and credits, and banks and bankers can not. If it be conceded that banks and bankers can not deduct, the only way that their burden of taxation can be made equal to that of individuals is to say that deductions are forbidden to the latter also. And unless this is said the property of the state is not taxed by a "uniform rule."

It is argued, however, that these words, "so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals," are a mere deduction from the premises in the same section; that the constitution regards the taxation of banks and bankers without permitting them to deduct, as precisely equal to the taxation of individuals not employed in banking, although the latter may deduct. The mere statement of this proposition would seem to refute it. It makes the constitution tell a plain falsehood on its face. It makes it say that it means equality when it means inequality. It converts one of its substantive provisions, in harmony with the whole spirit of the instrument, into a false deduction. It makes the con-

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stitution not merely a law, but a commentary upon that law. It supposes it to give reasons for its provisions, and concedes that the reasons given are false. I can not so construe it. I can not turn any part of it into a mere argument. I regard its provisions as law, and not deductions from law. I regard it as truthful and not deceptive. And when the language of any of its provisions is plain and unambiguous, when the natural import of the words is in harmony *with the rest of the instrument and with its whole [46 spirit, I know of no rule of construction that permits such natural import to be disregarded.

But it is asked why was section three inserted at all if it was not intended to establish a rule as to banks and bankers different from the rule respecting individuals? With more propriety I might ask why was section four of article three inserted, which provides that "the property of corporations, now existing or hereafter created, shall forever be subject to taxation the same as the property of individuals?" There was no absolute necessity for this section, for without it section two of article twelve would have embraced these corporations. But it was inserted out of abundant caution, that there might be no doubt either as to existing or future corporations what would be the rule of taxation. So section three was inserted, that there might be no doubt how existing, as well as future banks and bankers, whether incorporated or unincorporated, were to be taxed; that there might be no doubt what property of theirs was to be the object of taxation; and further, to deprive them of even the \$200 exemption, which may be permitted to individuals under section two. And hence it is that we find in it the words "without deduction."

It is said, however, that in the debates of the constitutional convention the idea is nowhere found that deductions from the moneys and credits of individuals would not be permitted. This may be so. I do not know how the fact is. But suppose it to be so, what weight should it have against the plain language and manifest spirit of the instrument? None whatever. Upon a doubtful question some respect is undoubtedly due to those debates. No more important body ever sat in the state; perhaps none that contained more learning and ability. But the debates of a body that forms a constitution or law are proverbially unsafe guides for its interpretation. Those who speak are generally few compared with those who vote, and among the debaters themselves there is sel-

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dom seen a uniformity of construction. The advocates of a pro-
47] vision are often silent as to some of its necessary *results in order to avoid opposition, and its enemies sometimes misconstrue its meaning or exaggerate its consequences in order to defeat it. Debates are not always listened to, and a speaker is liable to be misunderstood or misreported. A brief speech on the floor sometimes acquires a wonderful length in print; and reasons that the body never heard may first see the light through the agency of the press. In the meantime the law has been adopted, each member voting upon it according to the light of his own judgment.

For these and other reasons that might be given, the debates of even a body that finally enacts a law, can seldom be relied on for its true meaning. They can never overcome its plain, unambiguous terms. But the convention was not such a body. It ordained nothing. It merely recommended a constitution to the people, and it is to the vote of the latter that the instrument owes all its validity. The question, therefore, is not how did the convention, but how did the people understand it? In order to ascertain this, what guide have we so safe as the plain, natural import of its words? For one man who read the debates of the convention, there were probably hundreds who read the constitution before voting upon its adoption. Each one had a right to suppose that its language was used in its ordinary signification. Each one had a right to suppose that it spoke truth upon its face; that there was no deception in it; that when it used the term equality, it meant equality, and that if adopted, it would be so construed. As before remarked, the existing evil was inequality. It was to be remedied, not by establishing a different kind of inequality, but by ordaining a uniform, equal law.

And why not do so? Why make discriminations that have no foundation in justice or policy? Why say to the man who owes for his farm, you shall not deduct your debts, and at the same time say to him who has ten times the value of the farm in the shape of money, you may deduct yours? Why make the same unjust discriminations against the merchant, the manufacturer, the mechanic, in a word, everybody, who owes for lands, goods, or chattels?
48] What peculiar *merit over these citizens has the man who hoards his money instead of paying his debts, or invests it in the purchase of claims upon his neighbors, that his means, to a large extent, should escape taxation, while all their property, save fifty dollars in value, is taxed? And where is the policy of encouraging

backwardness in the payment of debts? Why offer a bonus for delay in discharging one's obligations? Why make it the interest of an individual not to settle with his creditor until after the assessor has been around and taken his list?

I make these remarks to show that there is nothing in the principles of justice, nothing in public policy, nothing in the spirit of the constitution, that requires us to disregard the plain letter of that instrument. On the contrary, they all concur, in my judgment, in requiring the construction we have placed upon it. I grant that it would be more equitable to tax every man upon precisely what he is worth. But as this can not be done under the constitution, as lands and goods must be taxed without deduction, justice requires that the same rule should apply to other property. The rule should be uniform, and so the constitution requires it to be. Depart from this, and you discriminate against one kind of business to foster other kinds of business; you grant privileges to one species of property, which you refuse to all others; you favor one class of men at the expense of the rest of community. This the tenth section of the law does, and as it is opposed, in my judgment, to both the letter and spirit of the constitution, I hold it to be void.

This brings me to the second question: May that section be treated as void without affecting the validity of the remainder of the act? I think it may. Strike that section out, and the law permits no deduction from moneys and credits. There is no necessity, therefore, for holding the entire act to be void. The unconstitutional provision is not so connected with the remainder as to vitiate all. The bad may be rejected, and the good left.

*Such being our views, it remains to be considered whether [49 the complainant is entitled to the relief sought; namely, a perpetual injunction against the collection of the tax assessed against it.

This question might be briefly disposed of. There is no averment in the bill that any person in Ohio has been permitted to make deductions from his moneys and credits. Unless this has been permitted, the tax assessed against the complainant is no more than is proper. Now, we can not, *ex officio*, take notice that deductions have been made. We can not, therefore, say, for aught that appears on this bill, that the complainant is improperly taxed.

But, as the bill might be amended, I have considered the question as if it contained the necessary averments, and, after the most mature deliberation of which I am capable, I feel compelled to

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deny the relief. The complaint is that some persons have escaped their proper proportion of taxation, by which means the complainant is taxed too much. If this be true, as to the complainant, it is equally so as to every corporation and every individual in whose favor no deduction has been made. If the tax assessed is wholly unconstitutional and void as to the complainant, it is equally so as to an immense number of the tax-payers of the state. The question is, therefore, one whose magnitude can hardly be exaggerated, and it demands all the consideration that it has received. The tax-payer ought not to be required to contribute more than the constitution exacts, and if he is so required, he ought not to be remediless. On the other hand, the demand of too much should not exonerate him from the payment of his proper share; and if a court of equity could give relief, it would seem but equitable to make him, in the first instance, pay the proper amount.

But what means have we of ascertaining the proper amount? None whatever; nor is it at all probable that any evidence could be furnished that would enable us to even approximate it. For, as the rate of state taxation is fixed with reference to the grand 50] aggregate of all the taxable *property returned in the state, it is obvious that, in order to ascertain the excess of the state tax demanded of the complainant, we would have first to know the amount of all the property in the whole state that had improperly escaped taxation. And in regard to the county, township, and city taxes, we would have in like manner, to learn what had escaped in their respective boundaries.

This looks like an impossibility. If so, does it follow that as the bad can not be separated from the good, the whole tax must fall? If we so hold, we must be prepared to say that whenever an assessor, either willfully or innocently omits to get a list of all the taxable property within his jurisdiction, no taxes can be collected at all; for by such omission, those whose property is listed are taxed more than if the omission had not occurred.

Let us suppose, for instance, that by some accident no list was taken in the city of Cincinnati, or that the list was lost or destroyed before the assembly had fixed the levy for state purposes. It is evident that the grand aggregate of the state would be greatly diminished, quite as much so as it has been under the 10th section complained of. But would it follow that no tax for state purposes could be levied anywhere in the state? Could every tax-payer

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out of Cincinnati obtain an injunction, because the want of the Cincinnati list had increased the rate of taxation upon his property? I can not so hold, for to do so would, in my judgment, render it impossible ever to collect any taxes in the state. It may safely be affirmed that there has never been a year since the state existed, that a large amount of property, subject to taxation, has not escaped, and thereby the listed property been burdened too much. This takes place every year, in every township, city, and town, and will forever take place. What remedy can a court of equity apply? I see none at all.

Neither is the treasurer who has distrained, liable; for the fault, if fault there is, is not his. The error has occurred in the listing, with which he has nothing to do. It was not he who permitted the deduction to be made, and the duplicate *delivered to him [51 contained no evidence of any such deductions. He, therefore, is not responsible, as was decided in *Loomis v. Spencer et al.*, 1 Ohio St. Whether there is any other officer liable, or whether there is at last found a wrong without a remedy, it is not now necessary to decide. It is sufficient that we can not afford the relief sought by the bill.

I have said nothing upon the question made by the bill, whether section 60 of the banking law protects the complainants from the imposition of any other tax than that therein specified, that question having been decided at the last term. For reasons that it is unnecessary to occupy time by stating, I concur in that decision.

CORWIN, and CALDWELL, JJ., concurred; RANNEY, J., dissented.

RANNEY, J. I concur with my brethren that the injunction granted in this case should be dissolved, and the bill dismissed, but being unable to agree with them in their construction of one of the most important provisions of the constitution of the state, I proceed at once, and without apology, to state the grounds upon which my conclusions are based. The complainant is a branch of the State Bank, and claims that it is taxed, in common with the other banks of the state, by the tax law of April 13, 1852, much more than is authorized by section 60 of the act of 1845, under which it is organized, or by the present constitution of the state. So far as protection is sought under the act of 1845, its claims were fully considered at the last term of this court in several cases then heard, in which it

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was held that section 60 of that act interposed no obstacle to the taxation of the banks formed under it, in common with other property, in such manner and to such extent as the general assembly should see fit to provide; that the general assembly of 1845 had not by that act attempted to surrender or abridge this power in subsequent legislatures; and that it would not have been binding if it had been attempted.

52] *It only remains now to consider whether the tax law of 1852, under which this tax is levied, is consistent with the constitution of this state which took effect September 1, 1851. It is claimed to be unconstitutional, and the tax illegal, because, by section 10, individuals and corporations other than those exercising banking privileges, are allowed "to deduct from the gross amount of their moneys and credits, the amount of all *bona fide* debts owing by such person, company, or corporation, for a consideration received." From which it is claimed, and I think is manifest, although not sufficiently shown in the bill, that the tax upon this institution is larger than it would have been if no such deductions had been allowed.

My brethren assent to the position that this section of the law is in conflict with the constitution, but nevertheless hold that it may be stricken out and separated from the balance of the enactment without prejudice to the other provisions of the law, which are in themselves perfect and complete; and inasmuch as the complainant is regularly taxed in accordance with those provisions, the tax is legal and may be enforced. Proceeding upon these grounds, I might be brought to the same conclusion; but I cannot agree that this section, in so far as it allows debts owing by individuals to be deducted from moneys due to them, and taxes only the balance, is in conflict with any provision of the constitution. To authorize us to declare that such conflict exists, the case must, as we have already held, be clear, plain, and palpable. "The presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case." *C., W. & Z. R. R. v. The Commissioners of Clinton County*, 1 Ohio St. 82.

Is it, then, *plain, obvious, manifest*, that the convention that framed, and the people who adopted the constitution, intended by section

2 of article 12 to prohibit the general assembly from allowing individuals to deduct *their liabilities from the gross amount of [53 debts due them? or, by section 3 of the same article, intended to extend to banks the same right of deduction as might be allowed to individuals? I hold the negative of both questions, and hope to be able to show that section 3 was inserted for the very purpose of declaring and enforcing this difference, without which it would have been entirely useless and improper; and that instead of working inequality in the *burdens* of taxation, as between banks and individuals, the contrary construction results in the very inequality against which this section was intended to provide.

The great object of all construction is to arrive at the intention and purpose of the law-maker. This is never to be lost sight of, and will always control the strict letter of the law, when, by adhering to that, its great leading purpose would be defeated. It must be so construed, *ut res magis valeat*; and to do so, a consideration of its spirit and policy, the mischief felt and the remedy provided, becomes indispensably necessary. This is due to any enactment; and in an eminent degree to the constitution of a republican state.

It must not be dissected, and its parts construed separately, but the intention of the lawgiver is to be deduced from a view of the whole, and of every part taken and compared together. He must be presumed to have intended to be consistent with himself throughout, and at the same time to have intended effect to be given to each and every part of the enactment. It results from this, that general language found in one part is to be modified and restricted in its application, when it would otherwise conflict with specific provisions found in another; and this from the reasonable and almost irresistible conclusion that when the mind is drawn to particulars, the language used is more likely to express the intention than general words which might otherwise cover it, but from which it does not appear that the particular case was in the mind of the legislator when he used them.

In the light of these long-established guides to direct our course to the great end of all construction, let me first inquire, *what [54 are the great leading objects of article 12, in connection with other provisions relating to the same object, apparent upon its face?

I answer: 1. To compel the legislature, by laws stating distinctly the object, to provide for raising by taxation, each year, an amount of revenue sufficient to defray the expenses of the state, pay the

interest on the state debt, and by section 7, article 8, not less than one hundred thousand dollars for the sinking fund.

2. To prohibit the laying any part of this sum upon persons by the poll; from which, with deference to others who have thought differently, I am unable to distinguish imposition upon professions and occupations.

3. To designate the *basis* of taxation to be *property—property alone*—and all the property of the state, with some few specified exemptions, to be allowed at the discretion of the general assembly.

4. To require the same burden to be laid upon the same value, whether it consists of lands, goods, money, or choses in action, or in whatever way it may be used or employed. This is taxing all values “by a uniform rule;” and if I understand rightly this provision of our constitution, it was designed for the same purpose, and effects the same object, as between persons and places, as that provision of the federal constitution which requires “all duties, imposts, and excises to be *uniform* throughout the United States;” although it goes further, and enforces the same uniformity as to every species of property. Whatever goes upon the duplicate, let it be lands, goods, moneys, credits, or investments in bonds or stocks, goes there at its true value; and must, under all circumstances, be subjected to the same rate per cent. of taxation.

But the question still is, what is each individual bound to place there as the basis upon which this levy is to be made? The complainant's counsel answer: All his real and personal property in possession, at its true value in money, and the gross amount of all 55] his choses in action, of whatever name, *without any regard to the debts he may owe. Their argument amounts to this: Section 4 of article 13 provides: “The property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as the property of individuals.” Banks are corporations; and by section 3 of article 12 they are required to be taxed upon the gross amount of all their choses in action, and other property without deduction; and at the same time are only to “bear a burden of taxation equal to that imposed upon the property of individuals.” If individuals are allowed to deduct, it necessarily throws a greater burden upon the banks, and their property is not then taxed “the same as the property of individuals.” Besides, by section 2 of article 12, “all moneys, *credits*, investments in bonds,

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stocks, joint stock companies, or otherwise," are expressly required to be taxed; while no deduction for debts owing is provided for."

An argument thus ingenious and plausible at least, and which my brethren think sound, deserved and has received my utmost attention; but I can not avoid believing it makes the constitution speak language it was never designed to speak, and results in consequences at variance with its spirit and policy.

A moment's consideration will show that the argument can derive no strength from the section quoted from the article on corporations. Banks, it is true, are corporations, but their taxation is specially provided for by section 3, of article 12, which must, as we have seen, limit and control the general language in the former section, if any difference is found to exist between them.

If no such difference is found, it can, of course, add nothing to the force of the latter. It is, however, plain to me, that the section was merely intended to assert the general principle, that the property of corporations "now existing or hereafter created," should, like the property of individuals, forever be *subject* to taxation, without attempting to prescribe the particular manner in which this should be done, but leaving *that entirely to the appropriate [56 article upon finance and taxation. Viewed in that light, and with reference to previous legislation, it was not only proper, but very important. The general assembly, for many years, had been in the habit of inserting in acts for the incorporation of turnpike, plank-road, canal, and probably railroad companies, provisions exempting them from taxation. For the purpose not only of prohibiting this in the future, but of subjecting all such existing companies to taxation, this section was inserted. It has, therefore, an obvious and extensive subject-matter for its operation and effect, without pressing it to the unreasonable length of controlling, or in any way affecting, the specific provisions of the article upon finance and taxation. This brings me to that article, and I proceed first to consider its second section.

It provides: "Laws shall be passed, taxing by a uniform rule, all moneys, *credits*, investments in bonds, stocks, joint stock companies, or otherwise; and also, all real and personal property, according to its true value in money." The section then proceeds to allow the general assembly to exempt from taxation certain specified property devoted to public, literary, religious, and charitable purposes; and

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also, personal property not exceeding in value \$200 to each individual.

I say nothing of the right to deduct from moneys, or from investments in bonds and stocks, for the double reason that these may be, and for most purposes are, regarded and treated as property in possession, having intrinsic value, and not the mere evidence of claims upon others, and because no deduction is allowed from these "investments" by the section of the law under consideration. *Credits* are, by the constitution, to be taxed, and from the *gross* amount, each individual is, by this section, entitled to deduct his *bona fide* debts, and return the balance. The language of the law may not be strictly accurate. The evident meaning, however, is, that debts may be deducted from the gross amount of notes, 57] accounts, and other choses in action, belonging *to the individual. If the balance thus ascertained, is not the precise amount and value of the *credits* of the party against the world, both in legal and popular sense, I confess myself unable to understand the meaning of words or force of language.

This section does not say the gross amount of all notes, accounts, and other choses in action shall be taxed; and it can not be so construed, in my opinion, without perverting both its language and obvious meaning, and making it work an injustice never contemplated by those who framed and adopted it. Consider for a moment its practical operation under such a construction. A has a note of \$1,000 upon an insolvent man, from whom no part of it can be collected. Is he to be taxed every year upon the nominal amount due from this insolvent creditor? I presume this would not be contended; and yet, if he is not, it is only because the note, as such, is not taxed, but only the sum of money which the holder is entitled, and may expect to receive upon it. If the constitution was silent, the power of ascertaining its true value, and taxing only that, would be necessarily implied. But it is not silent; it imperatively requires it, in language too plain to be misunderstood, and which ought not to be confined in its application to the phrase "real and personal property," but should be construed distributively, and applied to each enumeration preceding those words.

A has an account against B for a thousand dollars, and B a like amount against A. Neither owes or could recover against the other anything, and yet \$2,000 must be put upon the tax duplicate. Or if it should be thought to make any difference, suppose the same

state of indebtedness to exist, evidenced by promissory notes. Each is a chose in action held by the party to whom it belongs, and under a construction which sticks in the letter, must be returned to the assessor; and yet it is clear that neither, as against the other, has one cent of *credit*, either in amount or value. These evidences of indebtedness have no intrinsic value, and are only worth something because the estate of the owner is to be increased *by receiving something upon them. Where in the aggregate [58 he is entitled to receive nothing, if he is taxed, he is taxed upon pure fiction. The tax duplicate may be in this way increased, but not from the property in the state.

What, then, does the constitution require to be taxed? Plainly *property, wealth, substantial values*, and nothing else. The pecuniary burdens of the state are made a charge upon the property of the state. They attach to it as an incident; issue out of it; and the holder is only charged by reason of his ownership of it. This property may be in possession of the owner, or it may be in action—in the hands of others for his use and benefit. He should and is required to be taxed upon the whole amount of his property in possession, and such further sum as he is entitled, and able to add to it as against the world, from his rights in action. This is the measure, extent, and value of his *credits*. He is thus taxed upon everything he owns, and if taxed more, he is made to pay more than his share of the public burdens. This, it is true, may be more than he is worth after paying his debts; and it might be more equitable, if practicable, to make him pay only on what he is worth. But this has never been, and is not now the basis of our system. Owning property upon which the tax is a lien, he stands charged by reason of his ownership, and the state does not look beyond the property itself, for the charge upon it. Whoever may be the owner, and however much it may be encumbered with debts, it is still property having intrinsic value, protected by the laws, and rightfully charged with its proportion of the necessary expense arising therefrom. The debts of the owner may be due to persons out of the state, and beyond the reach of our laws. If in such case, the debts of the owner could be received, to discharge the property of this just and equitable burden, a large amount of property within the state would entirely escape taxation. If due to persons within the state, and the credit is taxed, still no injustice is done to the owner of the property, for the government protects it in his hands as long

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59] as he chooses to keep it; and certainly, *none to the creditors, for they are not taxed beyond the wealth they possess, or the amount they are entitled and expected to receive. The owner can not be relieved, and the burden upon his property transferred to his creditors in the way of a tax upon the credit, because it is entirely *impracticable* if the creditor is within the state, and *impossible* if without it. The creditor can not be relieved without gross injustice as between him and other tax-payers.

But is it not a little remarkable, considering the construction now put upon the constitution, that, while this system of assessing and taxing credits had constituted a part of our revenue system for many years, not one word of discontent was uttered in the convention or elsewhere, to my knowledge, against it; and at the same time a most vigorous attempt was made to extend the principle to deductions from tangible property. But it is said we are bound to shut our eyes to all such considerations. I do not think so; but I admit they are not to be used to control the plain and obvious language of the instrument. In what sense was the word *credit* used? is the question. It is claimed to be intended as equivalent to notes, accounts, and other evidences of indebtedness, and to require the gross amount of all these evidences to be taxed. On the other hand, I insist it was never intended to tax them, as such, at all, and that the word is susceptible of no such meaning. I feel prepared to defend not only the spirit and object of the provision, but also its literature. It neither violates justice nor standard English, if the best lexicographers may be relied upon for the definition of the words. Webster says this word, used in the plural, signifies "a sum of money due to any person; anything valuable standing on the creditor side of an account."

We are constantly to keep in mind, as I have already said in respect to the notes against an insolvent maker, and as is admitted, that *the true value in money of the credit is only to be taxed*. Now, if there is no balance, assuredly there can be no "sum of money due," however large the items upon each side of the account may
60] be. And is it not equally clear that *the items upon the credit side are of *no value* so far as they are balanced by the debts upon the other side? If the account existed between two merchants, I think it would not be difficult for them to understand it so. But the account is to be stated between the individual and the state. To ascertain the *wealth* he has beyond his property in possession,

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the state charges him with the debts due to him, and credits him with those he owes. If the balance is in his favor, it is authorized and required to tax him upon this balance. And why? Simply because there is the exact sum of money due to him as against all others, and he is just as much richer as it amounts to.

But suppose this is doubtful. What more obvious method to ascertain the sense in which the word was used than to place ourselves in the situation of those who used it, and look at things exactly as they saw them. To consider the "occasion and necessity of the law"—whether a mischief was felt, and if so, what remedy was intended to be provided—not to be governed by what this or that man might have said, but what was the received and general contemporaneous construction put upon the language employed by those who used it, and others, at the time. This is not prohibited. On the contrary, it has passed into a maxim that *contemporanea expositio est fortissima in lege*.

If we are permitted to look at things as they were seen, and understand them as they were understood, we shall find that no fault was found with the established system in this particular, no mischief was felt, and no remedy proposed. On the contrary, it was upon all hands received as an established fact, that it was authorized, and would continue if the constitution was adopted.

Notwithstanding what I have said of the meaning of the word "credits," I must confess a disinclination to indulge in any mere verbal criticisms upon so grave a subject. Language, at best, is but an imperfect vehicle of thought, and when used with the sententious brevity required in enunciating a great principle in a constitutional provision, intended to govern future cases, it can [61 not be made so certain and explicit as not to admit of doubt as to its interpretation, unless those who perform this office, looking through the mere forms of expression, are able to embody and distinctly comprehend the great leading idea which governed in its use. In no other way can the intention, which must always prevail, be arrived at. Nor is this in the least departing from the path of judicial duty. Lord Erskine but reiterates the universal sentiment of courts and jurists, under every system of law which has ever risen to the dignity of a science, when he says: "Where the strict letter of the law is contrary to its spirit, or to equity, judges ought not so much to regard the proper or received signification of the words as that meaning which appears most consonant to the

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design of the law. And he bids fairest for a just interpretation who keeps constantly in view the mischiefs or defects which existed in the former laws on the same subject, the remedies which the statute has provided to cure them, how far those remedies are proper, and what sense appears the most consonant to the subject-matter, and most agreeable to equity." With this end in view, and and as the third section, it seems to me, demonstrates what was intended by the second, and must therefore be construed with it, I proceed to its consideration: "The general assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues of every description (*without deduction*), of all banks now existing, or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals."

Does this section mean anything? An established rule of construction compels us to suppose it was *intended* to mean something. Utter folly can not, in the first instance, be imputed to those who placed it among the fundamental laws of the state. However poor our recollections, we can not forget that it was supposed to mean [62] something, by both its *friends and foes in and out of the convention. And yet, if the construction of the second section contended for, is correct, I think it clear, it is pure surplusage, and entirely unmeaning.

What effect can it have? Did it intend to assert that all banks "now existing or hereafter created," should be taxed upon all their property? That was already done by the fourth section of the corporation article. Did it intend to require all notes, other choses in action, and property of every kind belonging to banks, to be taxed without deduction for liabilities? That, we are told, is exactly what is positively and plainly required by the second section. Did it intend to subject their property to the same burden of taxation as that of individuals? If taxed upon exactly the same basis, neither being allowed deductions, and "by a uniform rule," it could result in nothing else. Did it intend to deny to banks the same exemption permitted to be allowed to individuals by the second section? This could not be, because deductions and exemptions are two separate and distinct things, having no connection; and, because, by the second section, the exemption could only be allowed to "individuals," and not to a corporation of any kind. Be-

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sides, to suppose this was made the subject of a separate constitutional provision, would certainly indicate a return of the "day of small things."

I can not regard this section as either useless or unmeaning. In my judgment, it is pregnant with meaning throughout. In the first place it prescribes definitely what property belonging to banks shall constitute the basis of taxation. This is, in short, all choses in action, and all other property. It is certainly remarkable, that the same mind intending to effect the same object, should have used the term *credits* in the second section, and should have changed the phraseology to notes, bills, etc., in the third; and it is still more remarkable, if no deductions were to be made from choses in action on account of liabilities, by the second section, that it should have been expressly interdicted by the third. This *change of ex- [63] pression certainly indicates a purpose, a distinction, and not that both sections were to be construed to mean exactly the same thing. I am well convinced a distinction was intended; a distinction found in the subject-matter to which each relates, and necessary to the ends of justice; a distinction, not destructive of equality of burdens as between banks and individuals, but necessary to preserve it; a distinction which makes the third section indispensable, and without which the constitution would have been unjust. This distinction consists in allowing individuals to deduct from the debts due to them, the debts they may owe, and denies the right to do so to the banks. But it is asked, why should this be done? This question was many times asked and answered in the convention that framed the constitution, and while it was pending before the people for ratification. The objectors never denied that this difference obtained, but insisted that it was inconsistent with the equality professed, and therefore unjust. The answer given, and upon which a majority approved the instrument, I believe to have been sufficient, and adopt it now. The only *necessary* liabilities of a bank consist of its circulation. This it has a right, at all times, to maintain up to a certain amount. Although in strictness, it consists of mere promissory notes, yet, in effect, it is an exclusive privilege to create a circulating medium, and for all practical purposes to give it the character of money. It is loaned as money without paying interest upon it; and the obligation of the borrower taken upon interest. In effect, it is never payable during the continuation of the bank; for, if redeemed, it is immediately reissued, and the

amount outstanding is left as large as before. In fact, the bank itself, indirectly, *receives*, instead of paying interest upon its own indebtedness, which, by law, usage, and necessity combined, has, so far as profit and gain to the bank are concerned, all the attributes, uses, and beneficial enjoyment of money, and constitutes a source of wealth to its stockholders instead of a burden upon them. Upon the other hand, the indebtedness of individuals has nothing of this 64] *character. It is payable at a certain time; almost always upon interest, often at a high rate, and is, to all intents and purposes, a burden, a source of impoverishment to him who has it to pay.

Is it strange that the constitution did not subject things so entirely dissimilar in their nature, to the same rule? Is it strange, while the bankers considered, used, and enjoyed their circulation as money, and a source of wealth and profit, and the law so far considered it so, as to allow it to be used as a tender in payment of debts, unless objected to at the time, and to be levied, upon execution, as property having intrinsic value, that the convention did not ignore all this when taxes were to be levied? In short, is it strange, while the government lightens its hand to relieve a burdened class, that it did not at the same time, in the same manner and to the same extent, relieve from taxes a benefited class, to whom it had almost surrendered, in the way of special privilege, the government prerogative of coining money. I think it would have been "passing strange" if it had; and would have destroyed that equality of burden between the two classes of persons, which I admit it was the greatest object of the constitution to effect.

This construction gives effect, and I think a just effect, to all the provisions of the constitution, to every sentence and word in it; while the opposite renders nugatory, useless, and unmeaning, the whole of the third section of the twelfth article; and to my understanding, perverts, from the natural and intended meaning, much of the language of the second section. It shows the necessity of the third section to prevent banks from deducting their liabilities for their circulation from the debts due to them; and by the strongest possible implication, demonstrates that they would have been entitled to this deduction, in common with others, under the second section.

I have said the only *necessary* liabilities of a bank consist in its circulating notes. I do not say this in ignorance of the fact that it

is authorized, at its election, to receive *deposits and deal in [65 exchange. But it is perfectly evident that the tax upon money received upon deposit, and used by the bank, is no charge whatever upon it. Its market value for this purpose will be regulated with reference to the charge upon it; and of course less interest will be paid for its use than if no such charge existed; and only enough will be paid for its use to still leave the customary profit to the institution. If any one is injured it is the depositor, whose money is thus made less valuable in the market for this purpose.

But it is said the constitution proclaims *equality* of burdens in taxation as its great cardinal principle. I admit it; and assert that it also *means* equality, and has adopted the very plan that secures it. What is really *wealth* it calls wealth, and taxes it accordingly. What is really a burden, a source of impoverishment, it calls so, and treats it accordingly. The paper money issued by banks, under authority of law, and represented in their notes and bills discounted, is lent as money, borrowed as money, and the interest paid for its use as money. It buys lands and goods, and everything valuable, and therefore the constitution treats it, as those who issue it treat it, as so much *wealth*, impresses upon it the character of property, and refuses to allow deductions on account of it. Exactly the reverse arising from individual indebtedness, a different rule is applied, and deductions on account of it, from debts due to the individual, are allowed. This is no arbitrary distinction. It has its foundation in the essential character and attributes of the subject-matter to which it applies; and results, as I firmly believe, in charging upon property employed in banking a burden of taxation only equal to that imposed on the property of individuals.

The construction adopted by a majority of the court will undoubtedly result in swelling very largely the taxable basis of the state; one of the counsel supposed one hundred millions of dollars. I should not be surprised if it should come *to one-half that [66 amount. This will, to some extent, reduce the taxes of these institutions, as well as those of tax-payers who are not indebted. This would be matter of congratulation were it not for the fact that every dollar taken from their shoulders must be placed upon those less able to bear it, and levied substantially upon persons instead of property. I especially fear its effects upon a large class of enterprising merchants and manufacturers, whose course of business compels them to purchase their stock, to a great extent, upon credit,

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and to extend a like credit to their customers. I feel very sure that it never could have been intended to lay unusual burdens upon a class of men who had contributed so largely to develop the resources and increase the wealth of the state.

A question has been made as to the jurisdiction of a court of equity in this case, if the tax had been unconstitutionally levied. Without entering upon an examination of this question, I will barely say that if a case was made upon the merits, I should be of opinion that the jurisdiction might be maintained.

ROWLAND ELLIS AND WILLIAM R. MORTON v. FRANCIS LINCK AND
CHARLES THOMAS.

The decision already made by this court in the case of the Exchange Bank of Columbus v. Hines, having settled that the 10th section of the tax law of April 13, 1852, is unconstitutional and void, it follows that private bankers, even if they are not the bankers contemplated by the 3d section of article 12 of the constitution, can not deduct their debts from their moneys and credits.

But if the correctness of that decision could be doubted, it is the opinion of the court that private bankers could not make such deduction. Persons having money employed in the business described in the 15th section of the act in question are bankers, such as are forbidden to make deductions by the constitution, article 12, section 3.

Moneys deposited with a bank or banker (unless *specially* deposited) become the moneys of the bank or bankers, appertaining to the business of banking, and proper to be listed with the other moneys belonging to that business; and this is equally true of general deposits, whether they happen to be used in the discounting of paper, or held in reserve to pay probable current demands.

67] *THIS is a petition in error, filed in the Supreme Court, by leave of one of the judges thereof. The transcript attached, on which the errors are assigned, is of the record of a judgment rendered by the court of common pleas for Hamilton county, in favor of the defendants, upon an agreed case, submitted by the parties to that court for determination and judgment, in pursuance to section 495 of the code of civil procedure.

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The facts agreed upon are as follows: That the plaintiffs are an unincorporated partnership, engaged in the business described in the fifteenth section of the act entitled an act for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money, passed April thirteenth, eighteen hundred and fifty-two, as natural persons, not exercising any franchise or special privilege not common to all other citizens, and that they had been so engaged for more than a year prior to the first day of May, in the year eighteen hundred and fifty-two, in the second ward in the city of Cincinnati, in this state:

That, in compliance with the requisition of the assessor for the said ward, the plaintiffs returned under oath as the average value of their property, including moneys, notes, bills of exchange, bonds, and stocks, appertaining to their business aforesaid, which they had had from time to time in their possession or under their control during the year next previous to the time of making such statement, for taxation in the year eighteen hundred and fifty-two, the sum of ninety thousand three hundred (\$90,300) dollars:

That the said amount was returned to the office of the auditor of the county of Hamilton, placed upon the tax duplicate, and the plaintiffs charged thereon with a tax for the year eighteen hundred and fifty-two, of fourteen hundred and eighty-nine 95-100 (\$1,489.95) dollars, for all purposes, being at the rate of sixteen and a half mills on the dollar, which was the legal rate of taxation for the said year:

That on the thirtieth day of December, eighteen hundred and fifty-two, the said auditor listed the plaintiffs for taxation *upon [68 the tax duplicate, in the further sum of eight hundred and eighty thousand (\$880,000) dollars, making altogether the sum of nine hundred and seventy thousand and three hundred (\$970,300) dollars, as the amount of property appertaining to the business of the plaintiffs as aforesaid, subject to taxation, and charged the plaintiffs with an additional tax of fourteen thousand five hundred and twenty (\$14,520) dollars, being at the rate of sixteen and a half mills on the dollar on the said sum of eight hundred and eighty thousand (\$880,000) dollars, making the entire tax charged against the plaintiffs, sixteen thousand and nine dollars and ninety-five cents (\$16,009.95):

That the said sum of ninety thousand three hundred (\$90,300) dollars is a correct statement of the average value of all the prop-

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erty appertaining to the business of the plaintiffs as aforesaid, which they had had from time to time in their possession or under their control, during the year next previous to the first day of May, eighteen hundred and fifty-two, estimated as provided in the fifteenth section of the act aforesaid, after deducting from the gross amount of their moneys and credits, the correct amount of money deposited with them by others, subject to be withdrawn on demand by the depositors, and that the said sum included the value of all moneys and credits belonging to the plaintiffs, or which they had had from time to time in their possession or under their control, during the said year, after making the deductions aforesaid :

That the plaintiffs tendered to the defendant, Charles Thomas, treasurer of Hamilton county, as their taxes for the said year, the said sum of fourteen hundred and eighty-nine 95-100 (\$1,489.95) dollars on the twentieth day of December, eighteen hundred and fifty-two, which he refused to accept; but on the nineteenth day of October, eighteen hundred and fifty-three, forcibly and against the consent and protest of the plaintiffs, took from them, for their taxes for the said year, the sum of sixteen thousand and nine 95-100 (\$16,009.95) dollars, together with the sum of eight hundred 49-100 69] (\$800.49) *dollars, being five per cent. penalty thereon, making in all, the sum of sixteen thousand eight hundred and ten 44-100 (\$16,810.44) dollars.

The controversy between the parties depends upon the following questions, to wit :

1. Whether under the act aforesaid, entitled " an act for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money," passed April 13, 1852, the plaintiffs are entitled to deduct from the gross amount of their moneys and credits, including those appertaining to their business as aforesaid, the amount *bona fide* owing by them to depositors and others, for consideration actually received.

2. Whether the act aforesaid is contrary to the constitution of the State of Ohio, so far as regards the rule prescribed by it for taxing persons engaged in the business described in the fifteenth section thereof.

If the court shall determine either of these questions in the affirmative, judgment is to be entered in favor of the plaintiffs for fifteen thousand three hundred and twenty and 49-100 (\$15,320.49) dollars, with interest from the day it was taken; if it shall deter-

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mine both questions in the negative, judgment is to be entered in favor of defendants for cost of suit.

All other questions are, by agreement, waived.

Worthington & Matthews, for plaintiff.

George E. Pugh, attorney-general, and *Warden & Paddock*, for defendants.

CORWIN, J. The case is submitted upon the points shown in the foregoing statement.

Upon these points, counsel on either side have favored us with extended and elaborate arguments as to the construction to be given to various sections of the "act for the assessment and taxation of all property in this state, and for levying taxes thereon, according to its true value in money," passed April *13, 1852; and as to [70 the conformity of said act to the provisions of the new constitution of Ohio, all of which are, in effect, decided at the present term of this court, in the case of the *Exchange Bank of Columbus v. Oliver P. Hines*, Treasurer, etc., and which do not require further notice here. For, even if it be true, as contended by plaintiffs, that they do not come within the provisions of the third section of the twelfth article of the constitution, yet they are still individuals, and liable to pay taxes as other individuals; and it being settled that the provisions of the tenth section of said act, allowing deductions of the debts owing by the tax-payer, from his moneys and credits, are inconsistent with the provisions of the constitution, every citizen is to be taxed upon his property without deduction or exemption, except as provided in section 2 of article 12 of the constitution.

But if a doubt should anywhere exist as to the correctness of this conclusion, or the policy and justice of the rule thus established, still these plaintiffs would have no occasion to complain that a right of deduction of their debts from the amount of their assessment for taxation has been denied to them; the agreed statement of facts before recited clearly and conclusively showing them to be of the description of persons provided for by section 3 of article 12 of the constitution, which expressly prohibits the deduction they here claim.

The language of the section is: "The general assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues of

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every description (*without deduction*), of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals."

The taxation, without deduction, of every conceivable description of property of all banks which may at any time exist in Ohio, is thus clearly and fully provided for without the introduction into 71] the section of the words, "and of all *bankers;" and in giving construction to the section we are to conclude that the framers of the constitution have adopted an unmeaning description of persons, or that they intended to provide for the taxation by the same rule, of the same property in other hands as well as though it were the property of chartered banks.

And leaving the circle of incorporated banks, and going out into the world to look for bankers, where will they be found, unless they are described in the agreed statement here presented? They are thus shown to be engaged in every department of banking business, except the mere thing of issuing notes intended to circulate as money—a privilege almost always exercised by an incorporated bank, but which is not at all essential to the existence of a bank, and which does not necessarily enter into its definition. Every business man in community knows that the class of persons to which these plaintiffs belong, transact the greater part of the banking business of the country; and if we were not forbidden, by every rule of construction, to exempt them from the operation of the section of the constitution referred to—if it were possible to adopt the conclusion for which they contend, it is manifest that property employed in banking in Ohio, instead of being taxed, without deduction, as the constitution has plainly intended, would utterly escape taxation. Chartered banks would become at once mere banks of issue; and if they should find themselves in that condition, attended with difficulties as to taxation, by a mere change of location beyond our territorial limits, they would furnish the currency to be put into circulation by the actual banker at home, who would himself own the bank of issue, become indebted to it for the amount of his issues, and claiming the right to deduct such indebtedness from his moneys and credits, he would avoid his proper contribution toward the support of the government; and while this extensive interest would be permitted, by such subterfuge, to avoid, as it has too long managed to do heretofore, the support of the government

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whose protection it enjoys, the burdens *of taxation must be [72 devolved, with increased weight, upon the labor and industry of the country.

It was to avoid this unequal, unjust, and oppressive result, that the framers of the constitution have wisely provided, that all property employed in banking shall always bear a proportion of taxation "equal to that imposed on the property of individuals." We are of opinion that the plaintiffs are bankers within the meaning of the constitution, and that their property has been properly listed for taxation, "without deduction."

A question is also made by counsel, as to whether deposits of money with bankers are to be considered as the property of the bankers, and as such, liable to taxation.

It is well known that the current deposits of most of these private bankers constitute the principal capital employed by them in banking operations; and in the absence of special agreement to the contrary, the moneys deposited go into the general fund which constitutes the basis of all their business operations—the person receiving the deposit becoming liable, not for the return of the specific money deposited, but indebted to the depositor generally for the amount. And whether these deposits are used in the discounting of paper, in the purchase of notes and bills, or held in reserve to pay current demands, they are equally the money of the banker, and are equally employed in the business of banking. And we are all of opinion that neither chartered banks nor unincorporated bankers can constitutionally deduct from the gross amount of their moneys and credits the amount due to depositors.

The taxes due from the plaintiffs having been fully paid, as shown by the agreement, the judgment of the court below is affirmed, with costs.

BARTLEY, C. J. I fully concur in the conclusion adopted in the opinion of the court, that the tax was properly assessed; that the plaintiffs had no right, under the constitution of the state, to exempt any part of their taxable moneys and *credits from the [73 assessment, by deducting from the amount thereof, their liabilities, either to depositors or others, that the provision of the tenth section of the tax law of the 13th April, 1852, allowing such deductions, is unconstitutional, and was, therefore, very properly treated as a nullity; and that, upon this ground, the judgment of the court

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below should be affirmed. On the subject of the invalidity of the provision of the tenth section of the law, my opinion is fully expressed in the case of the Exchange Bank of Columbus v. Oliver P. Hines, decided at the present term.

But I differ from the opinion of the majority of the court touching the construction to be given to the third section of the twelfth article of the constitution. To my mind, it is very clear that this provision of the constitution has an exclusive application to banks and bankers endowed by law with the *special privilege* connected with the business of banking, the exercise of which, by other persons, is prohibited. I do not think that the term "bankers," as used in this section, can, by any fair and satisfactory interpretation, include exchange brokers, and unincorporated or private bankers, not authorized to issue paper money, or exercise any special privilege connected with the business of banking.

The second and third sections of this article of the constitution are as follows :

"SEC. 2. Laws shall be passed, taxing, *by a uniform rule*, ALL moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise ; and also all real and personal property, according to its true value in money ; but burying-grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempted from taxation ; but all such laws shall be subject to alteration or repeal ; and the value of all property, so exempted, shall, from time to time, be ascertained and published, as may be directed by law.

"SEC. 3. The general assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description (without deduction), of all banks, now existing, or hereafter created, and of *all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals.*"

74] *The second section provides a basis for taxation general in its terms, and broad enough to comprehend all property of every description ; and in the absence of the third section, it would have reached the property of the incorporated banks by a fair construction. It requires that *all property*, without *exemption or deduction*,

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should be taxed, exempting only the specified *charitable exemptions*, and the *exemption* in favor of *individuals*. But the framers of the constitution deemed it proper, through abundant caution, to insert the provision of the third section, with a specific and exclusive reference to "*property employed in banking*." The reason of this is made apparent by reference to the legislation of the state on the subject of taxing incorporated banks for several years preceding the adoption of the constitution. The incorporated banks, or banks exercising special privileges, claimed to be beyond the reach of the legislative power under the former constitution of the state, and were in fact resisting the general tax laws of the state at the time of the formation of the present constitution. And it was claimed that there was something peculiar in the condition and nature of the property of the banks of issue essentially different from other investments in property. For this reason, and to prevent any implication or inference in favor of exempting property invested by the incorporated banks from equal taxation, this third section of the constitution was provided.

The brokers, stock-jobbers, and private bankers, are unincorporated—mere individuals, carrying on a private business, which every person in the community may engage in if he sees proper. Now, this third section expressly distinguishes between the persons engaged in the business of banking, within its true intent, and *individuals*. The tax imposed on the property of *individuals*, as distinguished from *banks* and *bankers*, is made the standard. All property employed in banking by banks and bankers, is required to bear a burden of taxation equal to that imposed on the property of *individuals*. The term "bankers," therefore, as here *used, [75 is expressive of persons having investments in the special and exclusive business of banking, as distinguished from the business and investments of individuals.

The seventh section of the thirteenth article of the constitution furnishes an interpretation to the language of the constitution which I have been considering. The banks and bankers, within the meaning of this third section, are of course persons in the exercise of "*banking powers*," within the contemplation of the constitution. And this seventh section expressly provides the mode by which these "*banking powers*" may be acquired by an act of the general assembly.

The property employed in the business of banking, therefore,

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which is subjected to taxation by the third section of the twelfth article of the constitution, is that which is invested in the special and exclusive business of banking, as distinguished from investments made in those pursuits which are common to all. With all proper deference, therefore, for the opinion of the majority of the court, I entertain the opinion that the provision of the third section in the twelfth article of the constitution does not apply to the property of the broker and private banker, but that their property is taxable under the authority of the second section.

RANNEY, J., concurred in the judgment, but dissented as to some of the reasons given for it. See his dissenting opinion in *Exchange Bank v. Hines*, ante.

MATILDA CARTER v. JAMES AND SAMUEL GOODIN.

A mortgagor in possession, being seized of the legal title to the mortgaged premises, until condition broken, and even then, as against all persons except the mortgagee, the widow of a deceased mortgagor is entitled to dower therein.

The wife of the grantee, in a conveyance of the legal title to real estate, is entitled to her contingent estate in the premises, although a mortgage was given by the husband for the purchase money, at the time of his receiving the conveyance.

76] *Where the vendee of real estate, in compliance with the terms of his contract in the payment of a part of the purchase money, satisfies a debt of his vendor secured by a subsisting mortgage on the premises given by the vendor, and in which his wife joined, to the person from whom he derived title, and causes the mortgage to be released on the record, at the time, by the mortgagee, no interest under the mortgage, or by means of the transaction, accrues to the vendee, in bar of the contingent dower estate of the wife of the vendor.

The principle decided in the case of *McFarland v. Febiger's Heirs et al.*, 7 Ohio, 194, affirmed.

PETITION for dower. Reserved for decision here by the district court of Hamilton county.

The petitioner asks for the assignment of dower in lot number eight in Carter, Goodin & Gwynne's subdivision in the city of Cincinnati. It appears that Ephraim Carter intermarried with

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complainant in 1808, and died in 1848. And that during coverture, on the 17th day of May, 1828, he purchased from John Wister, a piece of ground on the corner of Court and Vine streets, in the city of Cincinnati, and took a conveyance for the same, of which the lot in controversy is a part, for the consideration of \$4,400; and on the same day gave Wister a mortgage, in which petitioner joined, for part of the purchase money, payable in five yearly payments. On the 4th day of December, 1828, Ephraim Carter, Philip Grandin, and David Gwynne, entered into an agreement, by which Carter agreed to convey to Grandin & Gwynne the undivided one-half of said property purchased from Wister as aforesaid, and Grandin & Gwynne agreed to pay for the same to said Carter, \$3,500, in the following manner: \$1,000 in hand, and \$2,500 to be paid on Carter's said mortgage to Wister, divided into payments to suit Carter's payments to Wister, with interest. On the 6th day of December, 1828, Ephraim Carter made a deed pursuant to the contract aforesaid, to Grandin & Gwynne, for the undivided one-half of said property. This deed was subscribed and acknowledged by the petitioner, although her name did not appear in the granting clause, and it contained no words of relinquishment of dower. After the conveyance last aforesaid, Carter, *Grandin & Gwynne subdivided said real estate into sixteen [77] lots; and Carter subsequently, to wit, in September, 1829, conveyed the remaining one-half of the first twelve lots in said subdivision, held by him, including the lot in controversy, to Michael P. Cassilly one-fourth, and to Grandin & Gwynne the other fourth, by deeds admitted to be effectual and valid as to the release of dower; and on the 13th day of May, 1830, Cassilly conveyed his interest in the premises in controversy to Grandin & Gwynne. The mortgage given by Carter and wife to Wister, was satisfied and duly released on the record in July, 1833, by Wister, before condition broken, Grandin & Gwynne having paid the \$1,000 to Carter, and the balance of the purchase money to Wister on the mortgage in compliance with their said contract with Carter. Subsequently, on a partition between Philip Grandin and David Gwynne, the former released to the latter his interest in several of said lots, including the premises in controversy, which were afterward conveyed by Gwynne to the defendants.

A. N. Riddle and J. H. Clemmer, solicitors for petitioners.

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Storer & Gwynne, solicitors for defendants.

BARTLEY, C. J. It is well settled in this state that a mortgagor in possession is seized of the legal title to the mortgaged premises until condition broken, and even then as against all persons, except the mortgagee. Upon this principle Ephraim Carter was seized of the legal estate in the premises in the petition described, and the wife entitled to her contingent estate therein.

Was she divested of this estate by the subsequent conveyances in which she joined with her husband? The deeds of September, 1829, conveying one-fourth of the premises to Cassilly, and one-fourth to Grandin & Gwynne, were properly executed, and clearly passed her interest. But the deed of the 6th of December, 1828, for the undivided half of the property contains nothing which affects 78] the wife's rights. *However, the trite maxim that courts should favor dower may seem obsolete, it is not to be forgotten that this estate is given by the common law as a kind of compensation for the disabilities attaching to the wife in a state of coverture; and can not be cut off without a strict compliance with the formalities provided by law as a protection against imposition.

It was held by the Supreme Court in this state, in the case of *McFarland v. Febiger's Heirs et al.*, 7 Ohio, 194, that where a wife is named only in the clause describing the parties, and in the attesting clause of a deed, the covenants all being by the husband alone, and no terms employed touching the wife's contingent estate of dower, she is not concluded, though she join in a formal execution of the deed. Upon this ground the deed of the 6th of December, 1828, to Grandin & Gwynne for the undivided half of the property, was ineffectual as a conveyance or release of petitioner's right of dower.

It is claimed, in the defense, that the right of Wister under the mortgage given him, in which Matilda Carter joined with her husband, passed to Grandin & Gwynne on the payment by them to Carter of part of the purchase money, which by their arrangement with Carter was applied to extinguish the mortgage. Grandin & Gwynne did not purchase the mortgage of Wister, or even take an assignment of it; but Carter, by his contract with them, provided for the application of a part of the purchase money coming to him in discharge of a balance of his liability to Wister. And when the application was made, Wister released and discharged the mortgage.

The money, therefore, which was applied in satisfaction of the debt was the property of Carter, and not that of Grandin & Gwynne. And Carter suffered no default. He discharged the debt before condition broken, and before Wister had acquired any right to enforce the mortgage as the security for his debt. There was plainly no intention to give Grandin & Gwynne any right or interest under the mortgage, as it was released on the payment of the debt, instead of being transferred. Grandin & Gwynne relied for *their [79 title to the one undivided half upon the conveyance above mentioned of the 6th of December, 1828, which was subscribed and acknowledged by the wife, although she did not join in the granting part of the deed. This conveyance, therefore, upon which it was the evident intention of the parties to rely for their title, failing to contain a valid release of dower, the grantees can not help themselves by a resort to a satisfied mortgage, and especially one which was discharged by the mortgagor himself before condition broken, and, therefore, before even the mortgagee himself had acquired any right which he could enforce against the premises. It is true that the debt was paid and the mortgage discharged after Carter had sold and conveyed to Grandin & Gwynne. But the amount paid by Grandin & Gwynne to Wister on the mortgage was in reality a payment by them to Carter. It was a part payment of the purchase money coming to Carter. It was a compliance with a stipulation in their contract with Carter, by which his liability to Wister was extinguished. The money, therefore, thus paid by Grandin & Gwynne was paid for Carter's use, and in satisfaction of his own debt in the manner required by him. I know of no ground upon which Grandin & Gwynne can, under these circumstances, claim to be subrogated to the rights of Wister in the mortgage, and to acquire an interest in the premises under a mortgage the condition of which even was never broken.

The ground here taken, is fortified by the decision of the Supreme Court of this state in *Taylor v. Fowler*, 18 Ohio, 567; also by the decisions of the Supreme Court of Massachusetts in *Bolton v. Ballard*, 13 Mass. 227, and in *Barber v. Parker*, 17 Mass. 564, and also by the Supreme Court of New York, in *Hitchcock and wife v. Harrington*, 6 Johns. 290; and it is not inconsistent with the decisions in *St. Clair v. Morris*, 9 Ohio, 15, and *Rand and wife v. Kendall*, 15 Ohio, 671.

The case *Popkin v. Humstead*, 8 Mass. 491, which has been relied

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80] on as authority to sustain the defense, is not *strictly in point. In that case the mortgagor was never seized of the mortgaged premises or any part thereof, after the execution of the mortgage deed; and the mortgagee had actually entered and was seized of the legal estate in the premises. The administrator of the mortgagor under an order of sale, as it appears, sold the bare equity of redemption after the mortgage debt had fallen due; and the purchaser having taken the premises subject to the mortgage, afterward discharged the mortgage debt with his own money, and for his own benefit, and not under the requirement of any contract liability with the mortgagor.

But in the case before us, the defendants acquired no legal estate under the mortgage, and were in no way connected with it so as to derive any protection from it.

Decree for the assignment of dower in the one undivided half of the premises.

HUGH SLATER AND TERSAH ANN SLATER v. THOMAS CAVE.

The statute of limitations commences to run against an action which has accrued to a *feme sole* at the age of eighteen years, the time when the disability of infancy is removed, and not three years thereafter, when she reaches the age of twenty-one years.

In the interpretation of a statute, the manifest reason and intention of the law should prevail, although at variance with the literal import of the language employed.

In 1831, when the age of majority for females as well as males, in this state, was twenty-one years, the statute of limitations was enacted, containing a saving clause in favor of certain disabilities, as follows: "That if any person, entitled to any other action" (except that of ejectment), "shall, at the time the cause of action accrued, be *within the age of twenty-one years, feme covert, insane, or imprisoned*, such person shall be at liberty to bring such action within the times limited, *after such disability shall be removed.*" The law of 1834, fixing the age of majority of females at eighteen years and upward, altered, not the provision in the statute of 1831, but the subject-matter to which it was applicable, the words in the act of 1831, "within the age of twenty-one years of age," being equivalent to the words, within or under the age of majority, and the provision being intended to fix the period of the expiration of the age of minority as the time for the limitation to begin to run.

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*WRIT of error. Reserved in the district court of Lorain [81 county.

The plaintiffs, Hugh Slater and Tersah Ann, his wife, instituted an action of trespass for mesne profits, against the defendant, in the court of common pleas of Lorain county, and declared in the right of the wife to the rents, issues, and profits of certain lands, in said county, while she, said Tersah, was a *feme sole*. The defendant plead the general issue, and also a plea of the statute of limitations, alleging that the right of action did not accrue within four years next before the commencement of the suit. The plaintiffs replied specially, that at the time the cause of action accrued, said Tersah was an infant within the age of twenty-one years, to wit: of the age of eight years, and that four years had not elapsed between the time at which said Tersah became of the age of twenty-one years, and the day of the commencement of this suit. To this replication the defendant demurred. The common pleas sustained the demurrer and gave judgment for the defendant; to reverse which this writ is brought.

Clarke & Burke, for plaintiffs in error.

John M. Vincent, for defendant.

BARTLEY, C. J. This case presents the single question, whether the statute of limitations commences to run against a *feme sole*, at the age of eighteen years, when the disability of infancy is removed, or not till three years thereafter, when she reaches the age of twenty-one years.

The first section of the statute of limitations, fixes the limitation upon actions of trespass upon property, real or personal, etc., at four years. The second section is in the following words, to wit:

"That if any person, entitled to have or maintain any action of ejectment, for the recovery of the title or possession of any lands, tenements, or hereditaments, be at the time his right or title first descended or accrued, within the age of twenty-one years, *feme covert*, insane, or imprisoned, every such person may, after the expiration of twenty-one years, from the time his right or title *first descended or accrued, bring such action within ten [82 years after such disability shall be removed, and at no time thereafter. And if any person, entitled to any other action, limited by this act, shall, at the time such cause of action accrued, be within the age of twenty-one years, *feme covert*, insane, or imprisoned,

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every such person shall be at liberty to bring such action within the respective times limited by this act, after such disability shall be removed."

When this statute was enacted, February 18, 1831, the age of majority for females, as well as males, in this state, was twenty-one years. On the 17th day of February, 1834, a law was passed, fixing the age of majority for females, at eighteen years and upward.

The case presents simply a question of statutory interpretation touching the true intent and meaning of the provision, that "if any person entitled to any other action, limited by this act, shall, at the time such cause of action accrued, be *within the age of twenty-one years, feme covert*, insane, or imprisoned, every such person shall be at liberty to bring such action within the respective times limited by this act, after *such disability* shall be removed." Are the words "*within the age of twenty-one years*," as here employed, and by the connection in which they stand, to be understood as being simply expressive of the period of the removal of the disability of infancy, or, are they to be interpreted as meaning an arbitrary period in the age of the person, uncontrolled by the fact of such disability?

In the interpretation of statutes, words clearly expressive of the sense and manifest intention of the law are to be taken literally. But it is a fundamental rule of construction, that the language of a statute is to be interpreted according to the sense in which the terms are employed and the plain intention of the legislature. The great object of the rules and maxims of interpretation has been to discover the true intention of the law. We are taught by the maxim, *qui haeret in litera haeret in cortice*, that he who considers the mere letter of an instrument, goes but skin-deep into its meaning. Regard must be had to the real object of the law, and the effect and substance of the subject-matter, and not barely to the nicety of form or circumstance. The reason, intent, and spirit of a law, therefore, must often prevail over the literal import of the terms employed. The circumstances and relations of things change, so that after the lapse of time, we must sometimes give up either the letter of a law or its *true intent*. It is not necessary to refer to precedent to sustain the position that where the literal construction of a statute would lead to gross absurdity, or where, out of several acts touching the same subject-matter, there arise

collaterally any absurd consequences, manifestly contradictory to common reason, the obvious intention of the law must prevail over a literal interpretation, and it is even said, that provisions leading to collateral consequences of great absurdity or injustice, may be rejected as absolutely void.

The context of the language of the statute in question in this case, and the connection in which it is employed, show very clearly that it was intended to be expressive simply of the period when the disability of infancy ceased, and nothing else. The disabilities of coverture, of insanity, and of duress, are placed in connection with the words, "*within twenty-one years of age*;" and the words in the last clause of the section, "*after such disability shall be removed*," have an unquestionable and immediate reference to the *age mentioned*, as well as the other grounds of disability. The statute does not say that the limitation of actions shall begin to run from the time the person to whom the right accrues shall arrive at the *age of twenty-one years*, but from the time "*such disability shall be removed*." The age mentioned in this saving clause is, by the express language of the statute, therefore, termed a disability; and to conclude that the expression, "*within the age of twenty-one years*," here employed, meant not the period of the expiration of infancy, but a mere arbitrary period in the age of a person, would present not only a glaring solecism in language, but the use of words at variance with the obvious reason of the law and the manifest object and intention of the law-maker. The *subject-matter* of this statutory [84 provision is a restriction of the limitation of actions during the existence of a personal disability; the *object* is to favor those who are laboring under such disability; the *reason* is, that those who are under the age of majority, or under any of the other disabilities mentioned, are not capable of prosecuting actions at law for the recovery of their rights; and the manifest *intention* is to fix the period at which the limitation should commence to run at such time as the legal disability shall cease. Now, when this statute of limitations was enacted, the age of twenty-one years was the period of the removal of the disability of infancy, as to females as well as males; but when the act of February 17, 1834, was passed, fixing the age of eighteen years as the period for the removal of the disability of infancy as to females, although it in nowise repealed or amended the statute of limitations, yet, as to females, it produced a change in the circumstances and relations of the *subject-matter* of

this particular provision of the law, which altered not the law, but its application. When the age of twenty-one years ceased to be the period for the removal of the disability of infancy as to females, a change was produced in the subject of this provision in the statute of limitations, so that the *object* of the law, its *reason*, and *intention*, being manifestly to provide for the commencement of the running of the statute of limitations at the time when the disability of infancy ceased, it became applicable to females at the age of eighteen years, instead of the age of twenty-one. It is true the phraseology of the statute is, that if any person shall, "*at the time the cause of action accrued, be within the age of twenty-one years,*" etc.; but it is manifest that the meaning expressed by the language here employed, is *within the age of minority*, that being, in fact, the literal effect of the provision under the circumstances existing at the time the statute was enacted. Although the statute contains the expression, "*within the age of twenty-one years,*" yet it does not say that the statute of limitations shall begin to run from the expiration 85] of the twenty-one *years of age, but that the action may be brought *within the time limited, after such disability shall be removed*. The expression, "*within the age of twenty-one years,*" therefore, is equivalent to the words, "*within the age of minority,*" and was intended to convey no other or different meaning; and the period fixed by the statute at which the limitation began to run, was not an arbitrary period in the age of the person, but the time of the removal of the disability of infancy.

The construction here given to the statute in question is not latitudinarian, but fully justified by the enlightened rules of interpretation in common use. It is certainly no greater departure from the words of the statute than that well-settled interpretation of the words "*beyond seas,*" in another saving clause of the statute of limitations, whereby they have been determined to be equivalent to the words *out of the limits of the state*.

Mr. Justice Burnet said, in the case of *Burgett v. Burgett*, 1 Ohio, 221: "It frequently becomes the duty of courts, in order to give effect to the manifest intention of a statute, to restrain, or qualify, or enlarge the ordinary meaning of the words that are used. It is said that the power of construing a statute is in the judges who have authority over all laws, and more especially over statutes, to mold them, according to reason and conscience, to the best and truest use."

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"The intention of the law-makers may be collected from the cause or necessity of the act; the statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter." 4 Bac., title Statute, 1 S. 38, 45, 50. Again, he says on page 222: "Every statute should be construed with a reference to its *object*, and the will of the law-makers is best promoted by such a construction as secures *that object*, and excludes every other."

*In the case in which this doctrine was laid down it was decided, by the Supreme Court of this state, that a voluntary conveyance, made without consideration and for the purpose of defrauding creditors, is not void except as against creditors or subsequent purchasers, although a literal construction of the statute would render a covenous deed "*utterly void and of no effect*," not only as to the persons intended to be defrauded, but also strangers, and even to the grantor himself.

A statute of 1 Edward II. of England, enacted that if any prisoner should break out of prison he should be deemed guilty of felony. A prison having taken fire, a prisoner broke jail, and it was held "that he was not to be hanged because he would not stay to be burned." Plowd. 13.

An instance is stated by Puffendorf, on the authority of Herrenius, where the reason of the law was adjudged to control, instead of the language, on the ground that where the reason ceases the law itself shall also cease with it. There was a law that those who, in a storm, forsake the ship, should lose all, and that the ship and the lading should become the property of those who should stay in it. It happened that in a dangerous storm all persons forsook a ship except one sick man, who, in consequence of his illness, was unable to get out to make his escape. The ship, by chance, came safe to port, and the sick man claimed it as his by the express terms of the law. But it was adjudged that as the reason of the law was an encouragement to those who should expose their lives to save the ship, and that as this sick man neither stayed in the ship on that account, nor contributed anything to the saving of it, his claim could not be maintained, although within the letter of the law. Puffendorf, b. 5, ch. 12.

Now in regard to the provision of the statute in question, in this

case, being a *restriction* on the limitation of actions in favor of the disability of infancy, and the *reason* and *intention* being to fix the 87] period for the limitation to begin to run, at *the time when the legal disability of minority should cease, it is very plain that by the settled rules of interpretation, after the enactment of the law of February 17, 1834, the period when the statute of limitations began to run as to females, was the age of eighteen years, when the disability of infancy ceased.

It is claimed in the defense that this view of the case makes an unfavorable discrimination in regard to females, and allows the bar of the statute to be interposed as to them three years sooner than it is allowed as to the males. This is a glaring error. The period of the limitation as to the action in question is four years. This commences to run at the time of the removal of the disability of infancy, as to females as well as to males. The length of time for the statute to run is precisely the same in each case. The distinction is founded entirely on the difference in the time when the disability ceases. The female is favored by the rights of majority three years earlier than the male. This distinction is presumed by the law to be founded in nature, and the difference in the condition of the two sexes. If the bar of the limitation of actions did not arise as to the female, in such case as this, until four years after her reaching the age of twenty-one years, then seven years instead of four would, in fact, be allowed her, after the right of action had accrued to her, in full legal capacity, to claim and recover her rights. The act of 1834 does not merely confer upon the female the power of contracting at the age of eighteen years, but it also expressly provides, "*That she shall be at that age, to all intents and purposes, held and considered to be of full age, any law or custom to the contrary notwithstanding.*" For all purposes, and in all respects, the female of the age of eighteen years, has been treated in all judicial proceedings, and by the laws of the state, as of full age, since the enactment of this statute.

The replication, therefore, to the plea of the statute of limitations, in the opinion of the majority of the court, was insufficient 88] *in law, and the demurrer to the same was properly sustained.

The judgment of the common pleas is therefore affirmed.

CORWIN, J., dissenting. I disagree with the opinion of the court on the following grounds:

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1. That the second section of the statute of limitations, passed February 18, 1831, has never been repealed, expressly or by any necessary or reasonable implication.

2. That the act of February 17, 1834, simply enabled a female to make certain contracts after she had arrived at the age of eighteen years, and only repealed such laws as might disable her from making such contracts.

3. That repeals by implication are not favored, and will never be maintained, except when rendered necessary by established rules of construction, and for the furtherance of justice.

4. That there is no provision of the act of February 18, 1831, or the act of February 17, 1834, properly construed, which is inconsistent, void, or against good policy.

5. That all laws fixing or disposing of the rights of persons should be universal in their operation, and apply alike to all descriptions of persons.

6. That the conclusion of the court is without express legislative provision, and against the policy of our legislation, which has been to enlarge, extend, and protect the rights of women.

7. That the judgment of the court destroys the universality of the rule prescribed by the law itself.

8. That courts ought not, by the power of construction, to establish a rule creating a manifest irregularity in the rights of persons, and which withholds from that portion of society most needing it the protection which is extended to others.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO,

FOR PART OF THE YEAR COMMENCING

FEBRUARY 9, 1854.

PRESENT:

HON. JOHN A. CORWIN,	}	CHIEF JUSTICE.	
HON. ALLEN G. THURMAN,		}	JUDGES.
HON. RUFUS P. RANNEY,			
HON. WILLIAM B. CALDWELL,			
HON. THOMAS W. BARTLEY,			

FRANCIS DICK v. THE STATE OF OHIO.

In all trials for murder, the degree of the crime must be found as a matter of fact, and be specified in the verdict of the jury; and without an express finding, ascertaining the degree of the crime, the court is not authorized to inflict the punishment prescribed by law for either degree of the crime.

On the trial of an indictment charging the crime of murder in the first degree, in the descriptive words of the statute, a verdict of "*guilty in manner and form as he stands charged in said indictment*," is insufficient.

WRIT of error to the court of common pleas of Montgomery county.

The facts of this case will appear in the opinion of the court.

Dick v. The State.

Geo. W. McCook, attorney-general, and Odlin and Baggott for the state.

Charles Morris, Jr., and S. Sullivan, for the plaintiff in error.

BARTLEY, J. This writ of error is brought to reverse a judgment of the court of common pleas of Montgomery county, sentencing Francis Dick to the punishment prescribed for murder in the first degree. The indictment on *which the plaintiff in [90 error] was convicted, charges him with the murder of a person of the name of Catherine Young, and contains three counts, each of which charges him with the crime of *murder in the first degree*, in the language of the statute.

The verdict of the jury is recorded in the following words :

"That the defendant is guilty in manner and form as he stands charged in said indictment."

It is assigned for error, that the verdict does not ascertain the degree of the crime, as required by law.

The statute of Ohio provides: "That in *all trials for murder*, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall *ascertain in their verdict* whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed by examination of witnesses, in open court, to determine the degree of the crime, and shall pronounce sentence accordingly." Swan's Rev. Stat. 275, sec. 39.

It is claimed, that, inasmuch as the indictment charges the crime of murder in the first degree, and the verdict finds the defendant guilty *in manner and form as he stands charged*, the jury did, in substance and effect, *ascertain in their verdict*, the degree of the homicide.

The degree of the homicide is a *fact*, which the statute requires to be *especially found*. On an issue to a jury, it is requisite that the jury should *ascertain* or *find* this fact in their verdict; and in case of a plea of guilty, the court is required to determine this question of fact, from the examination of witnesses in open court.

In the determination of the question here involved, the *reason* of this statutory provision becomes important; and what is it? According to the established rules of criminal pleading, the different grades of criminal homicide may be charged against a party in the same indictment; and to sustain a conviction for murder in the

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second degree, or manslaughter, it is not necessary that either of those crimes should be specifically charged in the indictment; but 91] on the *principle that the higher grade of the crime includes each lower degree, an indictment for murder in the first degree would sustain a conviction for murder in the second degree, or manslaughter. So that, in case of a general verdict of guilty, without ascertaining the degree of the crime, under an indictment for murder in the first degree, there would exist uncertainty as to the judgment which should be entered; for while the indictment charged the highest grade of the crime, the legal presumption of innocence, in the absence of proofs to the contrary, always operating, would require the judgment to be for the lowest degree of the crime for which it could be rendered under the indictment. With a view, therefore, to *certainty* in a proceeding so important, involving a question of life or death, this statutory enactment was provided, requiring the degree of the crime to be ascertained by a special finding in the verdict, in case of an issue to a jury.

It is urged on behalf of the state, that as there is no distinction by way of grades or degrees in the crime of murder at common law, the criminal statute of this state creating the degrees in this crime, contemplated the use of the common-law form of indictment, and, therefore, provided for ascertaining the degree of the crime in the verdict of the jury; but that, where the indictment charges the crime not in the common-law form, but in the descriptive words of the degree of the crime contained in the statute, and the jury find the defendant guilty in manner and form as charged, the verdict does, in effect, ascertain the degree of the crime, and is a substantial compliance with the statute. This reasoning to sustain the judgment of the court below, will not bear the test of examination: First, because it is manifest, that the statute could not have contemplated the use of the common-law indictment, inasmuch as there are no crimes at common law in this state, and the statutory definition or description of the crime of murder differs from that of the common law. Second, because, although the distinction 92] of degrees in the crime of *murder* does not prevail at common law, yet the distinction *between *murder* and *manslaughter* does exist, making two degrees of criminal homicide by the common law of England; and yet, this statutory provision requires that the verdict ascertain the degree of the homicide, when the defendant is guilty of manslaughter, as well as when guilty of either

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of the degrees of murder; and, third, because the language of the statute is explicit, has no reference to the form of the charge in the indictment, and does not admit of qualification. "*In all trials for murder,*" the jury "*shall ascertain in their verdict,*" the degree of the crime, etc. The degree of the crime is a fact to be found by the jury; and it must be so specified as to appear, with certainty, from the verdict, without reference to the form of the charge in the indictment. It would be unsafe to allow the jury to ascertain the degree of the crime by a reference to the form of the indictment, as they are not so familiar with the technical form in which the crime is sometimes charged in the indictment, as to distinguish easily the requisites of a charge of one degree of homicide from that of another.

The words, "*in manner and form as he stands charged in said indictment,*" which are used in the record of the verdict, are, in practice, a mere matter of form, and are generally added by the clerk in entering the verdict. The indictment in this case contained all the requisites of a charge of murder in the first degree, and yet, had the verdict been, *guilty of murder in the second degree, in manner and form as he stands charged in the said indictment,* it would have been a good verdict. So, too, if the verdict had been, *guilty of manslaughter,* with the addition of the same words. In a judicial proceeding of such vast consequence, both to the community and to the accused, it was not intended that this provision of the law designed to produce *certainty*, should be evaded by mere words of form. Even where the conviction is by "*confession in open court,*" however specific the indictment may be in charging the degree of the crime, and although the prisoner may, even on interrogation, confess his guilt *in the form*, or, even the *degree* in which he is charged, yet the court is imperatively required to proceed, on the "*ex-* [93 *amination of witnesses in open court,* to determine the degree of the crime," etc. The prisoner is not allowed to determine the degree of the crime, by a confession with reference to the form and manner of the charge against him; but the degree must be found by the court, from the evidence, without regard to the form of the confession, or the mode in which the crime is charged in the indictment.

It is conceded by the attorney-general, on behalf of the state, that a simple verdict of "*guilty,*" on an indictment for murder in the first degree, would be insufficient. I must confess myself unable to perceive any very material distinction between that and

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the verdict which was rendered in the court below, in this case. The indictment sets out the statutory description of the crime of murder in the first degree; and the issue, which the jury was sworn to try, was upon the charge in the indictment, in manner and form as therein set forth. So that the simple verdict of *guilty* is a finding under the indictment, according to the issue, and when inserted in the full record of the case, shows a substantial—indeed, an actual—finding against the accused, in manner and form as he stands charged in the indictment. The addition, therefore, in the verdict of the words, “in manner and form as he stands charged in said indictment,” are mere surplusage, and without any legal effect upon the verdict. And whether a verdict in a criminal cause be that of *guilty* or of *not guilty*, these words are usually added by the clerk in recording the verdict, as matter of form.

The true object of this statutory provision, therefore, must be apparent. As an indictment for murder in the first degree embraces each of the three degrees of criminal homicide, of either of which the accused may be convicted, and as the issue which the jury is sworn to try involves a charge of each of these three crimes, on a general verdict of *guilty* which does not ascertain the degree of the homicide, the court could render no valid judgment, not knowing, from the verdict, for what degree of crime the judgment should be rendered. Hence, the statute has very properly provided that the degree of the crime shall be found from the evidence, and ascertained or specified in the verdict.

It is said that the statutory provision, above recited, is similar to a statute on the same subject in Pennsylvania, and that the decisions of the courts in that state sustain the judgment of the court below in this case. The tendency of the decisions referred to is to sustain the position that, where the indictment is so drawn as plainly to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner guilty in manner and form as he stands charged. *White v. The Commonwealth*, 6 Binney, 182; *Respublica v. Searle*, 2 Ib. 339; *Commonwealth v. Earl*, 1 Wharton, 525. But these decisions rest upon the ground that the statute of Pennsylvania does not define the crime of murder, but simply refers to it as a known offense existing at common law, and classifies it into different degrees, prescribing different punishments for the lower grades of the crime; so that the common-law form of indictment for murder was still sufficient,

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and in contemplation of the statute. The ground upon which these decisions were made does not exist in Ohio, and therefore they can have no application here.

A doctrine contrary to that which appears to have prevailed in Pennsylvania has been held in a number of the other states. In giving a construction to a similar statute on this subject, the Supreme Court of Connecticut, in the case of *The State v. Dowd*, 19 Conn. 388, said that, in all cases of murder, the degree of the criminality must be found as a matter of fact; and without an express finding of murder in the first degree, the court would not be authorized to inflict the punishment prescribed by law for that offense.

Under a similar statute in the state of Missouri, the Supreme Court of that state, in the case of *McGee v. The State*, held that, upon the trial of an indictment for murder in the first degree, a verdict that the jury find the prisoner "*guilty in manner and form as he stands charged in the indictment*," was *insufficient. This [95 case is strictly in point against the judgment of the common pleas in the case before us. The same doctrine was laid down in the case of *Davis v. The State*, 10 Georgia, 101; and is strengthened by the adjudications in Tennessee, *Kirby v. The State*, 7 Yerger, 259; *Mitchell v. The State*, 8 Ib. 827; and *McPherson v. The State*, 9 Ib. 280.

The Supreme Court of Ohio, held on the circuit, in the case of *The State v. Town, Wright*, 75, that if the jury, in case of a trial for murder, do not specify in their verdict whether they find the accused guilty of murder in the first or second degree, or manslaughter, the court will refuse to pass sentence, and award a new trial, even without a motion on the part of the defendant. And this, I believe, has been in accordance with the uniform practice in this state.

Not only, therefore, is the plain requirement of the statute, but also the weight of authority as well as the practice in this state against the correctness of the judgment under consideration in this case.

The judgment of the common pleas must be reversed, and the cause remanded for further proceedings.

RANEY, J., dissenting. After the most careful investigation I am entirely satisfied the verdict of the jury was sufficient to

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warrant the judgment pronounced upon it. Differing in this from a majority of the court, I shall proceed to state briefly the considerations which have led my mind to this conclusion.

The plaintiff in error stood charged in all the counts of the indictment with the crime of murder in the first degree. He was charged with having taken the life of Catharine Young "unlawfully, willfully, feloniously, *purposely, and of deliberate and premeditated malice.*" To this accusation the jury have responded that he "*is guilty in manner and form as he stands charged in the indictment.*"

So says the record, and no one doubts that it imports absolute 96] verity. I am aware of no rule of construction applicable *to a verdict for ascertaining the intention of the jury that does not equally apply to every other part of the proceedings in the cause; or, indeed, to any other instrument of writing where the same degree of certainty is required. If there is none it seems to me evident, upon general principles, that this verdict is a clear, distinct, and unequivocal affirmation of the truth of every material allegation contained in the indictment. Just as clear and distinct as it would be if it contained a recital of them all, with a statement that each and all of them were found to be true. And all of them being found true, the crime could be nothing else than murder in the first degree, and the court would be fully authorized in awarding the penalty, prescribed by law, to be visited upon those guilty of it.

Does the 39th section of the crimes act (Swan's Rev. Stat. 275) require more than this to be done? It provides "that in trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter, and if such prisoner be convicted by confession in open court, the court shall proceed, by examination of witnesses in open court, to determine the degree of the crime. and pronounce sentence accordingly."

The object of the general assembly in enacting this section is very easy to be seen and comprehended. It was intended to require the jury, in every case of felonious homicide, to go beyond the fact of killing, and from the facts and circumstance in evidence to determine the degree of atrocity with which it was done, and to which of the three sections of the statute, punishing homi-

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cide with different degrees of severity, the case of the accused properly belongs. It is at once conceded that it must distinctly and clearly appear from the verdict that the jury has performed this important duty, upon which the life of the prisoner may depend, before the court is authorized to give judgment upon it; or, indeed, intelligently can award the punishment due to the crime. A faithful adherence to the spirit of this enactment is absolutely *necessary to give practical effect to the humane policy of our [97] legislation in proportioning the penalty to the nature of the offense, instead of the undistinguished severity which followed conviction of murder at common law; and I am very far from intending to undervalue its importance, or to weaken its force in the least. But with this concession constantly in view, it is unquestionably true, that no prescribed form of expression is required to be used by the jury in communicating their finding to the court. It is enough, if, from the language used, it appears, without doubt or ambiguity, either from the facts found, or by a specific designation of the degree of crime, that the jury have discharged this part of their duty, and have intended to communicate the result of their deliberations upon the evidence.

When this is done, in either form, the degree of guilt is *ascertained*—made certain—in the verdict, and the court judicially knows what judgment to give, and what punishment ensues.

I have already stated, as my opinion, that this verdict does find and affirm the truth, with precision and certainty, of every material averment contained in the indictment; and as the facts there charged, undeniably constitute murder in the first degree, I think the jury have sufficiently *ascertained* the plaintiff in error to be guilty of that crime.

But it is said the indictment also charged him with murder in the second degree and manslaughter—that he might have been found guilty of either of those crimes upon the trial; and it is hence inferred, that finding him guilty as he stands charged, still leaves it uncertain which of the crimes included in the indictment the jury intended to affirm he had committed. That he might have been found guilty of either of the lesser crimes, under this indictment, there is no doubt, but quite as little, I submit, that neither of them is *the* crime charged upon him in the indictment. That crime is murder in the first degree, and to commit it, except in the attempt to commit certain other crimes, or by administering poison, requires

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98 not only an unlawful killing, but a killing *purposely, *and of deliberate and premeditated malice*. If deliberation and premeditation are wanting, the charge as made is not proved, but if the balance of the averments are proved, he is guilty, not of the crime with which he stands charged, but of a lesser crime included within it, and exactly covered by such averments. The crime charged consists of a specific number of indispensable elements, forming one indivisible whole. Without them *all*, it does not exist; and with them all, charged in the indictment, and found to be true "in manner and form *as charged*," I am wholly unable to see why they are not all as effectually made part of the verdict, by this reference to the indictment, as though they were all copied into it, and the truth of each distinctly affirmed: or how any one of them can be said to lack verification more than another—how the fact of killing can, with more propriety or certainty, be said to be found, than the equally indispensable fact, that it was done with deliberate and premeditated malice.

Viewing the verdict in the light I have presented, I should have deemed it a fair compliance with the requisitions of the statute, unaided by any judicial construction heretofore placed upon it. But a glance at the history and origin of this legislation very much confirms me in the views I have expressed. Murder was first separated into degrees, in this state, upon the revision of the crimes act in 1815 (2 Chase Stat. 856), and at the same time the section under consideration was first introduced. Prior to that time, all murder was punished with death, and the several statutes defining it substantially adopted the common-law definition of the crime.

The provisions of our act of 1815, which have been almost literally re-enacted ever since, were very plainly borrowed from the Pennsylvania statute of 1794, as will be seen by comparison of the two. That statute recites, "That whereas the several offenses which are included under the *general denomination of murder*, differ so greatly in the degree of atrociousness, that it is unjust to involve them in the same punishment," etc. It thus enacts: "That *murders* 99] which shall be **perpetrated by means of poison, or by lying in wait, or by any other kind of deliberate, willful and premeditated killing; or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and all other kinds of murder, shall be deemed murder of the second degree; and the jury before whom*

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any person indicted for murder shall be tried, shall, if they find such person guilty, ascertain in their verdict, whether it be murder in the first or second degree; but if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of crime, and to give sentence accordingly." United States Criminal Law, by Lewis, 1848, p. 351.

This statute treats murder as a known and definite offense; it does not attempt to define it as a substantive offense created by this statute, but to separate its degrees of guilt.

The crime is still regarded as existing at common law, and indictments are usually framed according to the common-law forms, which necessarily cover both degrees, and they have been uniformly sustained by the courts of that state.

In this respect their statute differs from ours, which creates and defines the offense, and in accordance with settled rules, requires the indictment to follow the language of the statute. This difference shows a greater necessity for the provision requiring the degree of guilt to be ascertained by the verdict in that state than this, since it would not otherwise ordinarily appear; but still, as the provisions are the same, they should undoubtedly receive the same construction. The Pennsylvania statute came under review and was first construed by the Supreme Court of that state, in the case of *White v. The Commonwealth*, 6 Binn. 182. C. J. Tilghman, says: "This act does not define the crime of murder, but refers to it as a known offense, nor so far as it concerns murder in the first degree, does it alter the punishment, which was always death; all that it does is to define the different degrees of murder, which shall be ranked in different *classes, and be subject to different [100 punishments. It has not been the practice since the passing of this law, to alter the form of the indictments for murder in any respect; and it plainly appears by the act itself that it was not supposed any alteration would be made. It seems taken for granted, that it would not always appear on the face of the indictment of what degree the murder was, because the jury are to ascertain the degree by their verdict, or in a case of confession, the court are to ascertain it by examination of witnesses. But if the indictments were so drawn, as plainly to show that the murder was of the first or second degree, all that the jury need do, would be to find the prisoner guilty in manner and form as he stands indicted."

This construction has been since uniformly followed, as may be

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seen from the cases of *Comm. v. Earl*, 1 Whart. 525; *Comm. v. Miller*, *Lewis Crim. Law*, 401.

The case of *White v. The Commonwealth* was decided in 1813. Two years afterward, the general assembly of this state incorporated the statute substantially into our criminal code. Now, aside from the respect due to the opinion of so learned a court, it is not fair to assume that, when we adopted it, it was intended to mean here just what it had been authoritatively settled to mean in the code from which it was taken? I think it is; and when it is remembered that a large portion of the members of our legislative bodies, at that day, were natives of the State of Pennsylvania, and well acquainted with her legislation and judicial decisions, I think it may be regarded as a legislative sanction of the correctness of the construction it had there received.

I am, therefore, of opinion, both upon principle and authority, there is no error in the record, and the judgment should be affirmed.

THURMAN, J., concurring in the views expressed by Judge Ranney, also dissented.

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Under the new judicial system established by the constitution of 1851, and the enactments under it, the district court has no jurisdiction, on the election of the defendant, or otherwise, to try cases of murder, unless they were pending in the old Supreme Court, and went to the district court by the transfer provided in the constitution, as pending business.

A verdict of "guilty in manner and form as charged in the first four counts of the indictment," is not a sufficient finding on an indictment for murder in the first degree. The verdict must specifically find the degree of murder whereof the defendant is convicted.

WRIT of error to the court of common pleas of Summit county. The facts and questions in the case appear in the opinion of the court.

Wolcott, Bliss, and Pleasants, for plaintiff in error.

Geo. W. McCook, attorney-general.

CALDWELL, J. This is a writ of error to the common pleas of Summit county. The defendant was charged with murder. The indictment is in the usual form of an indictment for murder in the first degree, charging the defendant with taking the life of William Beatson, by violence inflicted on his person, which is differently stated in the several counts, as having been done by a stone, knife, pistol, etc. Several errors have been assigned on the record. It is assigned for error, that the court refused to permit the defendant, on his own election, to be tried in the district court. This case arose since the adoption of the new constitution and the organization of the courts under it. Original jurisdiction has not been given the district court to try cases of murder; it is only in such cases as were pending in the old Supreme Court, where its jurisdiction had attached, and which went by the transfer as pending business, that the district court has jurisdiction. We think the court of common pleas decided correctly in refusing the election.

Exception is also taken to the verdict. The jury returned a verdict in the usual form, in ordinary cases, of "guilty in *man- [102 ner and form as charged in the indictment," without any specific statement of whether they found the defendant guilty of murder, in the first or second degree, or of manslaughter. A motion was made to set aside the verdict and grant a new trial, which was overruled by the court, and the defendant sentenced. In this, it is said, the court erred.

This same question was presented to this court, and decided by it in the case of Francis Dick v. The State of Ohio, ante, from Montgomery county, which was considered at the same time with this case, and which is reported by another member of the court.

The simple question presented is, whether a verdict in this form meets the requisition of the statute?

The 39th section of the act providing for the punishment of crimes (Swan's Stat. 238), enacts: "That in all cases for murder, the jury, before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict, whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession, in open court, the court shall proceed, by examination of witnesses, in open court, to determine the degree of the crime, and shall pronounce sentence accordingly." The language of the statute is clear and positive, and requires that

the jury shall ascertain, in their verdict, the degree of unlawful homicide of which they find the defendant guilty.

The reason and necessity of the rule are apparent to any one. In other cases of crime, the finding of guilty makes the verdict certain, without any possibility of mistake as to what the jury have actually found; the issue presented by the indictment is a single one; no different degrees are to be passed on. When the jury have found the defendant guilty, all the rest is with the court. They look to the charge in the indictment, which has been found true by the verdict as the predicate of their sentence. But where a defendant is charged with murder in the first degree, the case is very different; he is as well charged with murder in the second degree and manslaughter, as with murder in the first degree. He 103] *is put on his trial for all three of the offenses; the three distinct issues are all presented to the jury, and must be passed on by them, and the jury can and must find him guilty of one or another, as the evidence requires. There being three different crimes charged on which the jury are to pass, a general finding of guilty would be a finding of guilt of one or the other, but of no one in particular. It requires no argument to convince any reasonable mind, that it is only by a strict compliance with both the letter and spirit of the statute, that trials for murder can be conducted with any degree of certainty, and the most serious mistakes avoided.

It is said, however, in support of the judgment of the court, that the verdict is equivalent to a finding by the jury, that the degree of crime was murder in the first degree. The prosecuting attorney had entered a *nolle prosequi* on all but the first four counts of the indictment, and the record of the verdict is, "the jury being charged by the court, do, upon their oaths, say, that the said defendant is guilty in manner and form as he stands charged in the first four counts of said indictment." In the first place, we would say that the terms here used, are those used by the clerk in all cases in recording a verdict in form; terms seldom or never used by the jury, but which are warranted by a simple finding of *guilty*. A finding of guilty of something different from that in manner and form set forth in the indictment, would be no response to the issue—would be a nullity. Besides, it is not the province of the jury to determine the legal effects of the pleadings; most probably not one of the twelve men who constituted that jury, could determine the manner and form in which an indictment for murder in

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the first degree should be set forth ; it was not the business of the jury. The jury, without doubt, were informed by the court that the indictment contained as well a charge of murder in the second degree, and manslaughter, as of murder in the first degree. Would the verdict have been erroneous or repugnant, if it had found the defendant guilty of murder in the second *degree, [104 in manner and form as charged in the indictment? Most clearly not; indeed, this is the form in which the clerk would no doubt have entered a verdict of guilty of murder in the second degree.

This verdict, as we think, fails to find the degree of homicide, of which the defendant is found guilty, and the judgment of the common pleas is therefore erroneous.

The case of *McGee v. The State*, 8 Mo. 495, we regard as one directly in point. Where, under a statute like ours, the jury rendered a verdict similar to this, the court held, that the degree of crime not having been ascertained by the jury, the verdict did not form the predicate for a judgment. The same doctrine was held in the case of *The State v. Town, Wright*, 75, and such, we believe has been the universal ruling in this state. It is said, however, that it has been differently held in Pennsylvania. In the case of *White v. The Commonwealth*, 6 Binney, 183, the court say, that a verdict like the present would be good; but it is to be remarked in reference to that decision, that the question did not arise in that case, and what was said was a mere *dictum*. In the subsequent case of *The Commonwealth v. Earle*, 1 Wharton, 531, where the question on the statute was presented, although the court refer to what is said in the case of *White v. The Commonwealth*, with apparent approval, yet their reasoning agrees with the view which we have taken. That was a case of homicide by poisoning, and the court held, that inasmuch as unlawful killing by poison must be murder in the first degree, it was not necessary to specify the degree, and hold, that the provision for ascertainment of the degree by verdict was intended for cases in which the jury might be at liberty to find the prisoner guilty in the second degree. But even if authority could be found on the other side, it would not warrant us in setting at naught what we believe to be a plain and positive requisition of the statute.

The judgment of the common pleas will, therefore, be reversed, and the cause remanded for further proceedings.

RANNEY and THURMAN, JJ., dissented. See *Dick's case*, ante.

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The act of February 26, 1840, "providing for the collection of claims against steamboats and other water-crafts, and authorizing proceedings against the same by name," is a constitutional and valid enactment.

When the remedy is pursued against the craft by name, the proceeding is *in rem*, and no other notice need be given than that arising from its seizure.

The cases to which the act extends are not of exclusive admiralty and maritime cognizance, but those over which the courts of admiralty and common-law courts of the state have concurrent jurisdiction.

In such cases, the court first acquiring jurisdiction, by a seizure of the thing in controversy, withdraws it from the jurisdiction of the other; and it can not be taken from the custody of the law by process issuing from any other court.

Process issued upon proceedings instituted in admiralty for the recovery of seamen's wages, is no exception to this rule—especially when the court having the vessel in custody is competent to recognize and enforce his paramount lien.

The sheriff or other officer having the vessel in custody, under the state law, is under no obligation, and has no right, to surrender it to the marshal upon such process; and, if he does so, is liable to the creditor in the state court.

ERROR to the common pleas of Wood county.

The case fully appears in the opinion of the court.

Young & Waite, for plaintiff in error.

Spink & Murray, for defendant.

RANNEY, J., delivered the opinion of the court.

On the 20th of July, 1849, the plaintiff filed his claim in the court of common pleas of Wood county, against the steamboat Julius D. Morton, an enrolled vessel of more than twenty tons burden, then running between the port of Toledo, in this state, and the port of Buffalo, in the State of New York; for labor performed in her construction, under the act of February 26, 1840, "providing for the collection of claims against steamboats and other water-crafts, and authorizing proceedings against the same, by name." Curwen's Stat. in force, 503. Upon process duly issued, she was, on the same day, seized and taken

106] into possession by *the defendant, then sheriff of the county; and after judgment against her, and final process issued for her sale, was duly demanded of him by his successor in

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office. He refused to deliver her up, alleging, as the reason, that she had been taken from his possession by the marshal of the United States for the district of Ohio, upon proceedings in admiralty, instituted in the district court, on the 21st of the same month, by John McEacharn, for the recovery of wages claimed to be due him as first mate of the boat. This fact was set up, and allowed as a perfect defense to the action in the court below, and its sufficiency for that purpose, is the only question for our consideration. It involves considerations of much delicacy and importance, as it concerns a very beneficial remedy, provided by the laws of the state, the exercise of which is supposed to be in conflict with the laws of the federal government, and calculated to induce a conflict between its courts and those of the state. After giving the subject the careful attention it seemed to demand, we are unanimously of opinion the defense was insufficient, and that the court below erred in giving it effect.

Until 1845, the admiralty jurisdiction of the federal courts had never been extended to the waters of the western states. It may contribute to a clearer understanding of the act of Congress of that year, "extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same," as well as the water-craft law of the state, and the necessity of its enactment, to allude briefly to the course of opinion and judicial decision before and since that time. In the 2d section of of the 3d article of the constitution of the United States, it is declared that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." For more than half a century, this language was supposed to describe a class of cases over which the British court of admiralty had jurisdiction, at the time, and before, the revolution. What these were in the main, has never been doubted. Aside from its power over captures, and questions of prize arising *jure belli*, its cognizance of contracts was [107 confined to seamen's wages, bottomry bonds, and contracts made and to be executed on the high seas; and of torts and offenses done and committed on the high seas, and without the limits of any organized county—the one depending on locality, and the other the nature of the contract; and both arising beyond the jurisdiction of the common-law courts. The assertion of more extended powers, led to the passage of the memorable statutes of the 13th and 15th Richard II.; by the first of which, it was de-

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clared that the admiralty must "not meddle, henceforth, of anything done within the realm, but only of a thing done upon the sea;" and, by the last, it was still more specifically ordered, that of "things done within the bodies of counties, by land or water, the admiral shall have no cognizance, but they shall be tried by the law of the land."

It was evidently with this view of the extent of the jurisdiction conferred upon the federal courts, that the celebrated authors of the Federalist, while the constitution was pending, before the states for ratification, affirmed that "the most bigoted idolizers of state authority had not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." And so C. J. Jay, in *Chisholm v. Georgia*, 2 Dall. 419, in giving a comprehensive summary of the judicial powers conferred upon the Union, says: It extends "to all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose rights and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction." Chancellor Kent, in the last edition of his Commentaries (vol. 1, p. 372), after stating that it is not in the power of Congress to enlarge the jurisdiction beyond what was understood and intended by it, when the constitution was adopted, says: he "apprehends it may be fairly doubted, 108] whether the constitution of the United States meant *by admiralty and maritime jurisdiction, anything more than that jurisdiction which was settled, and in practice, in this country under the English jurisprudence, when the constitution was made."

For these reasons, so eminently proper did it seem to be, that the power should be conferred upon the Union, that almost the only remark it elicited in the federal convention, came from a highly intelligent member from Pennsylvania (Mr. Wilson), who said: "The admiralty jurisdiction ought to be given wholly to the national government, as it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen." Madison Papers, 799.

The same views evidently controlled the early decisions of the Supreme Court of the United States. In the case of the steamboat *Thomas Jefferson*, 10 Wheat. 428, the claim was for wages earned

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on a voyage from a point in Kentucky, up the Missouri river and back again. The district and circuit courts dismissed the libel, and the Supreme Court affirmed the decree, holding that the admiralty had no jurisdiction over contracts for the hire of seamen, when the service was not substantially performed upon the sea, or upon water within the ebb and flow of the tide. And in the steamboat *Orleans v. Phœbus*, 11 Pet. 175, it was held that the jurisdiction of courts of admiralty over contracts is limited to those, and those only, which are maritime; and that they had no jurisdiction over a vessel, although one terminus of her voyage might be in tide-water, if she was substantially employed in other waters. That the true test of jurisdiction is, whether the vessel is engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tide-waters.

But in *Waring v. Clark* (5 How. 441), decided in 1847, a majority of the court, for the first time in direct terms, repudiated the idea that the grant in the constitution is to be construed as limiting the courts of the Union to such cases only as were entertained by the British court of admiralty, and held, that the jurisdiction is neither to be limited to, nor to *be interpreted by, what were cases [109 of admiralty jurisdiction in England when the constitution was adopted by the states of the Union. The case was one of collision, occurring some two hundred miles up the Mississippi river, within the limits of a county, and in the heart of the State of Louisiana. The jurisdiction was maintained, although it was admitted it would not have been in England; upon the ground that it would have been there, at the common law, before the statutes of Richard, and because the vice-admiralty courts in the colonies had exercised an equally extensive jurisdiction before the revolution. It was still, however, confined to tide-waters, navigable from the ocean; and a volume of testimony was taken to show that the river at this point was slightly influenced by the tide.

Mr. Justice Woodbury delivered a very elaborate dissenting opinion, in which Justices Daniel and Grier concurred. After stating that "the controversy was not in England, and is not here, a mere struggle between salt and fresh water, sea and lake, tide and ordinary current, within a county and without, as a technical matter only," he proceeds to show that it involved three great principles: "1. The abolition of the trial by jury over large tracts of country; 2. The substitution there of the civil law and its

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forms for the common law and statutes of the states; 3. And the encroachment widely on the tribunals of the state over disputes happening there between its own citizens."

Justice Catron, although concurring in the decision, did so upon the ground that the proceeding was *in rem* to enforce a lien upon the boat, which the common-law courts were incompetent to do; and stated that he did "not intend to be committed to any views beyond those arising on the precise case before the court."

Another step, confessedly beyond the limits of the English admiralty, was taken in the case of the New Jersey Steam Navigation Company v. Merchants' Bank, 6 How. 344, where a contract for the carriage of specie from New York to Boston, and lost in Long [110] Island Sound, was enforced in the admiralty, *although the contract was made in the city of New York, and to be performed in the city of Boston. Justice Daniel dissented, and his opinion, as well as that of Justice Woodbury, in *Waring v. Clark*, contains a very able exposition of the views of those in favor of a more limited construction of the constitutional grant. Before these two decisions were made, and with the unanimous opinion of the Supreme Court twice expressed that the jurisdiction in admiralty was confined to causes arising upon the high seas, or at least on tide-water, the act of 1845 was passed. Judge Story, however, in the case of the *Thomas Jefferson*, had intimated the opinion that Congress might, under the power to regulate commerce between the states, extend the summary process of the admiralty to cases arising on the western waters. While it is by no means clear what power conferred by the constitution Congress supposed they were invoking, it looks very much as though this act was the result of that suggestion. It does not in terms confer admiralty jurisdiction; but it is an act to extend the jurisdiction of the district courts to "certain cases" arising upon the lakes and navigable waters connecting them, which are to be proceeded in and decided in the same manner as cases arising upon the high seas and tide-waters "within the admiralty and maritime jurisdiction of the United States." That it was, by Congress, referred to the power to regulate commerce is assumed by Justice Woodbury, in *Waring v. Clark*, and by Mr. Webster in his argument, in the case of the *Steam Navigation Company*, in which he represents Congress as "shivering and trembling" under the decision in the *Thomas*

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Jefferson, and for that reason "pitched the power upon a wrong location."

But in the case of the *Genesee Chief v. Fitzhugh*, 12 How. 443, it was held that the act did not rest upon that power; and Ch. J. Taney very conclusively shows that if it did "it would be unconstitutional, and could confer no authority on the district courts." It was, however, sustained upon the admiralty power, which was decided not to be limited to tide-waters, but to extend to all public navigable lakes and rivers *where commerce is carried on [111] between different states, or with a foreign nation. "If the water was navigable, it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the constitution." Justice Daniel again dissented, regarding it as an unwarrantable extension of the powers of the federal government, not by an amendment of the constitution, "but according to the opinions of the judiciary entertained upon their views of expediency and necessity."

It is thus made very evident, that this jurisdiction is not now what it was in England when the constitution was adopted; it is not what it was supposed to be by eminent statesmen and jurists of that period; nor what the Supreme Court of the United States for many years held it to be. It has been extended to a large class of contracts made and to be executed upon land, and within the limits of the states; to torts committed *infra corpus commitatus*; first upon tide-waters, and finally upon any navigable waters, whether connected with foreign commerce or not. The courts exercising this jurisdiction are no longer subjected to the restraints of the common-law tribunals, or impeded by prohibitions from them; but, on the contrary, we are now urged to annul the common-law and statutory remedies of the state, and to surrender property held by its process, whenever and as often as it shall be demanded by the inferior courts of the United States. The question assumes an importance, and the necessity of a clear and definite boundary to this jurisdiction is much more imperatively demanded here than in any other country. An extension of it involves not only an encroachment upon those great safeguards of liberty and property—proceedings according to the course of the common law, and the jury trial—but necessarily, in the language of Justice Woodbury, "an encroachment widely on the tribunals of the states." It is not simply a distribution of judicial power amongst different courts of the same sover-

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eighty, but involves an encroachment by a government of limited powers upon the rights of other sovereignties.

112] *While all will admit that there is "nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction," and that very strong reasons can be given in favor of national jurisdiction over those large bodies of fresh water which separate us from a foreign government, still, with the highest respect for the eminent jurist who delivered the opinion in the case of the *Genesee Chief*, some may continue to doubt (and I confess myself of the number) whether, if it had been understood when the constitution was adopted to extend to all the internal navigable waters of the country, subjecting suitors to be drawn from the local tribunals to great distances for the settlement of their controversies, and in last resort to the seat of the federal government, it could have been truthfully asserted that it had met no opposition; and whether embarking the general government in such extensive internal administration, over causes civil and criminal, is not to some extent a departure from the great objects for which it was created, and calculated to embroil it in collisions and controversies with the states injurious to the peace and security of both.

Assuming, however, as we do, the ultimate settlement of the extent of this jurisdiction to be correct, or at least decisive of the right of the district court to entertain the proceedings upon which this boat was taken from the sheriff, the consequences now claimed to follow have as yet received no countenance whatever from the Supreme Court of the United States or any state tribunal. These consequences are said to be: 1. That the jurisdiction in admiralty cases is exclusive in the district courts of the United States, and that all state laws conferring jurisdiction upon the state courts over causes that might be prosecuted in admiralty, and vessels that might be seized there, are repugnant to the constitution and laws of the United States, and void; but, 2. If they are not void, vessels taken into custody under process from the state courts may be lawfully taken from the officers of the law, upon proceedings instituted in admiralty for the recovery of seamen's wages. So far as the first of

113] *these positions is concerned, as well as the further objection to the water-craft law, that it provides for no notice to the owner, they have been settled by this court in the case of *Thompson v. The Steamboat Morton* (2 Ohio St. 26), in favor of the validity of the law.

This law provides that steamboats and other water-crafts, navi-

gating the waters within or bordering upon this state, shall be liable for debts contracted on account thereof, for materials, supplies, or labor, in the building, repairing, furnishing, or equipping the same, or due for wharfage; and also for damages, arising out of any contract, for the transportation of goods or persons; for injuries done to persons or property by the craft; and for injuries done by the captain or mate to any passenger or hand, on the craft, at the time the injury is inflicted. For any of these causes of action, proceedings may be instituted against the craft itself which is seized by the sheriff, and, unless released upon bond, is held in custody by him until final judgment; when, if judgment is against the craft, it may be sold upon execution to satisfy the demand. In the case of *Jones v. The Commerce*, 14 Ohio, 408, it was held that the statute only established the liability of the craft, but fixed no lien upon it prior to its seizure, and that claims against it were to be satisfied in the order of actual seizure by warrant. And, in that case, and the case of the *Steamboat Waverly v. Clements*, 14 Ohio, 28, it was further settled, that a purchaser of the craft, with notice of a debt or liability created or incurred on account of it by the original owner, takes it subject to such debt or liability; but that a judicial sale vests in the purchaser the title, divested of all liability to be again proceeded against, *under the statute*, for a claim existing at the time of sale. In *Lewis v. Cleveland*, 12 Ohio, 341, the act was held to extend to the recovery of seamen's wages; and in *Kellogg v. Brennan*, 14 Ohio, 72, and *Prevost v. Wilcox*, 17 Ohio, 359, it was determined that the debts and liabilities of the craft, arising under this act, covered the interest of a mortgagee, and were to be preferred in the distribution of the proceeds of the sale, to the mortgage money; especially, as [114] it appeared the boat was run for the joint interest of the mortgagee and owner. But it has never been held that specific liens upon the craft, existing before the seizure, and independently of the statute, would not be respected and upheld. It can not be for a moment doubted, that all such liens founded on causes of action, whether falling within the act or not, as by law are made superior to the debt or liability for which the craft is seized, would be preferred in the distribution of the proceeds of sale upon proper application made to the court for that purpose.

This statute, then, as stated by the court in *The Huron v. Simmons*, 10 Ohio, 461, "treats the boat as a person, and makes it

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responsible, in its own name, for all debts contracted for its use, and for all injuries committed against persons or property on board, by her officers or crew." The liability is upon the craft—the proceeding is against the craft—and the judgment operates alone upon the craft. Its seizure is indispensable to the jurisdiction of the court, and its continued custody, unless released upon bond and security, indispensably necessary to the further proceedings, after final judgment.

The proceeding, therefore, is strictly and technically *in rem*: it is pursued without reference to the owner, to enforce a liability which the *thing* itself has incurred, and the thing itself is condemned to make reparation. *Possession* is the essential element upon which the jurisdiction of the court depends; and as this possession is deemed that of the sovereignty under whose authority the court sits, if any question can be regarded as settled by the unanimous opinion of courts and jurists, it is this—that "the law regards the seizure of the thing as constructive notice to the whole world." *Hollingsworth v. Barber*, 4 Pet. 475. Other means for giving notice may be provided at the discretion of the sovereign power, upon the observance of which, the jurisdiction may, or may not, depend; but where they are not prescribed, the power of the [115] court over the thing when taken into the custody of the law, is perfect and complete, and the final disposition of it binding upon the world. As the subject of liability and seizure described in this statute, are so uniformly attended by the owner or master representing all interests, the legislature has regarded the seizure and taking the thing into custody, as effectual notice to those interested of the pendency of the proceedings, and has, therefore, provided for no other.

If, then, the state government had the power to give authority to her courts to entertain jurisdiction of the causes of action specified in this statute, and to enforce them *in rem*, it has been effectually done. Jurisdiction over the boat in this case was lawfully acquired; it was lawfully taken into the custody of the law; and the plaintiff had a right to require the sheriff to keep it in custody until it was lawfully disposed of after final judgment. That the state government had this power is perfectly clear, unless its exercise is inconsistent with the grants of power to the federal government, to be exercised by the courts of the Union. The argument that it is so, proceeds upon the ground that the causes for which the proceeding

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may be employed are causes of admiralty jurisdiction, to which the judicial power of the United States is extended, and over which *exclusive* jurisdiction has been conferred by Congress upon the district courts. And this, it is claimed, is conclusive against the jurisdiction of the state court, and demonstrates the illegality of the seizure of the boat in the first instance. But if the state court had jurisdiction, and the original seizure was lawful, it is still insisted it is a jurisdiction to be exercised in subordination to that conferred upon the district court, and can not be permitted to withhold any property liable to seizure upon the process of that court from its action, inasmuch as it is declared in the sixth article of the constitution of the United States, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything *in [116 the constitution or law of any state to the contrary notwithstanding." And it is hence inferred that the provision gives superior efficacy to process issued from the courts of the Union over that of the state courts, when exercising a concurrent jurisdiction; and authorizes them to withdraw property taken into custody and held by the latter under state laws; and especially is this said to be warranted upon proceedings instituted to enforce a mariner's paramount lien for wages.

To the first branch of this argument it is sufficient to reply that Congress (if it has the constitutional power, which I by no means concede) has not attempted to confer exclusive jurisdiction upon the district courts; but on the contrary, has expressly saved the common-law and statutory remedies of the states. By the act of 1845, it is provided that there shall be saved "to the parties the right of a concurrent remedy at the common law, when it is competent to give it; and any concurrent remedy which may be given by the state laws, where such steamer or other vessel is employed in such business of commerce and navigation." Now, it is quite immaterial whether the jurisdiction of the district courts over vessels employed in the navigation of the lakes depends upon this act, or may be supported upon the assumption that the act of 1789 extended to all the internal navigable waters of the country. In either case, Congress has positively declared that every suitor, at his election, shall have the benefit of state remedies; and has thus necessarily so far restricted

the jurisdiction and powers of the district courts as to make this declaration effectual. But without this saving, the jurisdiction of the state courts could not be doubtful. Without turning aside to inquire whether all, or what, of the cases provided for in the state law are such as would be cognizable in admiralty, under the enlarged views now entertained of that jurisdiction, it is undeniable that all of them are such as the original states enforced in their own tribunals, independent of national authority, before the adoption of the constitution of the United States; and such as they have 117] since *constantly entertained, and in most of those states have enforced under laws, in no material respect different from our own. In such cases the concurrent jurisdiction of the state courts was admitted in *Martin v. Hunter's Lessee*, 1 Wheat. 304. As evidence of the prevailing opinion upon this subject, and as fully expressing our own, we copy the following extract from Mr. Justice Story's Commentaries on the Constitution, vol. 3, p. 534, n. He says: "It (the admiralty jurisdiction) is exclusive in all matters of prize, for the reason that at common law this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of the courts of common law and the admiralty are concurrent (as in cases of possessory suits, mariner's wages, and marine torts), there is nothing in the constitution necessarily tending to the conclusion that the jurisdiction was intended to be exclusive; and there is little ground, upon general reasoning, to contend for it. The reasonable interpretation to the constitution would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature, and extent, and modifications in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. Hence, the states could have no right to create courts of admiralty, as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. *This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law jurisdiction.*"

Concurring fully in these views, we are brought to the undoubted conclusion that the state had full power to invest its courts

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with jurisdiction over the cases described in the water-craft-law, and that the boat, in this instance, was lawfully seized and taken into custody.

*If the state court had rightful jurisdiction over the craft [118 when the proceedings were commenced, could it be lawfully deprived of it during their pendency? A few very obvious considerations, it seems to us, furnish a sufficient answer to the asserted supremacy of the proceedings instituted in the district court.

The constitution of the United States, and the laws made in pursuance thereof, *we know*, and are happy to acknowledge, are the supreme laws of the land. The mistake consists in supposing them the only supreme laws in the land. Before the constitution of the United States was adopted, the people of the several states were, and still continue to be, the only source and fountain of sovereign authority which our theory of government acknowledges. To secure their happiness and safety, they had constituted governments, and invested them with the exercise of such sovereign authority as they deemed necessary for the purpose. Some of these powers, it was wisely thought, could be best exercised by a government extending over and common to them all. They erected such a government, and clothed it with certain enumerated and clearly-defined powers, drawn, in part, from those previously conferred upon the government of the confederation; in part from those in possession of the state governments; and in part, perhaps, from those until then undelegated. It is, however, entirely immaterial from what quarter they were taken. It is enough that the people were entirely competent to take them from any source they saw proper, and confer them upon the common government they created.

As these powers were to be exercised in the name and by the authority of the sovereign power conferring them, by the consent of all, for the benefit of all, their supremacy over the local institutions of the states necessarily followed, and was very appropriately declared. But, while the people of each state, adopting, or afterward acceding to, that constitution, were thus willing to remove every impediment to the uncontrolled action of the government created by it, within *the prescribed limits, they were not [119 less careful to confine it to those limits; and hence, in the 10th amendment, we find it declared, by the same high authority, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states

respectively or to the people." Each of these provisions is simply declaratory of a result to which a fair construction would have led without it; and neither, therefore, was absolutely necessary; but they were adopted from abundant caution, and evince the great solicitude felt to make, as far as practicable, a clear line of separation between the powers to be exercised by the federal government and the states respectively, and to avoid collisions in their operations, so detrimental to the permanency, stability, and usefulness of each.

The powers conferred upon the federal government, although of commanding importance, fell very far short of the necessities of a complete administration of civil affairs. To meet this necessity it became necessary to leave with, or afterward confer upon, the state governments much more numerous powers, and certainly not less important to the security of life, liberty, and property, than those with which the general government was invested. These powers are derived from the same high source, delegated in the same manner and for the same great object; each springing directly from the people, and resting upon the sure foundation of their sovereignty, is, within its allotted sphere of action, equally supreme and equally armed with ample authority for the execution of the important trusts committed to its care; each acting through its judicial department, operates directly and alone upon individuals; and each, when acting within its rightful jurisdiction, has supreme control over all the persons and property within the territory covered by its authority. If the courts of each are authorized to entertain jurisdiction over the same class of cases, it then depends upon the election of the suitor which shall be employed; but let it be the one or the other, so soon as its jurisdiction has attached, [20] by taking either persons or property into its custody, *it is entitled to proceed to final judgment, unmolested by the other. In cases of which the exclusive cognizance is not given to the federal courts, the states have the absolute and uncontrollable right to provide such remedies, either *in rem*, or *in personam*, as to them shall seem just and proper, and to authorize their courts, in the exercise of the sovereign authority with which they are invested, to seize upon and take into their custody either persons or property, as the nature of the case may require. If the proceeding is *in rem*, the possession taken becomes that of the sovereignty under whose authority it is taken, and is no longer that of the owner.

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And, as process issued from the courts of the Union spend its whole force upon individuals, or property in the possession of individuals, it necessarily follows that it falls short of conferring any authority whatever for interfering with the possession thus acquired of a sovereign state. However clearly the line between state and federal powers may be traced, still, as both must operate upon the same persons and property, nothing short of the absolute supremacy of the latter over the former, while each is acting strictly within its constitutional limits, could justify the inference here attempted to be supported.

It is impossible to foresee all the disastrous consequences to which such a principle would lead ; but instances will very readily occur. Both governments may lay and collect taxes upon the same property ; but property taken by the state for this purpose may be taken from it by officers of the general government. Both may punish the same persons for crime ; but persons imprisoned for infractions of state laws must be released to answer proceedings instituted against them in the federal courts. As a general thing, residents of the state can only prosecute their claims in the state courts ; but after judgment in their favor, and executions levied upon property for their satisfaction, the property may be taken from the officers of the law, upon judgments in favor of non-residents, subsequently obtained in the federal courts. Thus establishing a practical priority in favor of non-residents [121 over the citizens of the state. A construction so degrading to the state governments, and so utterly destructive of their ability to discharge the important functions for which they were instituted, we feel no hesitation in saying, finds no warrant in the language, history, or purposes of the constitution of the United States.

As yet, neither this construction, nor the asserted right of the admiralty courts to seize upon property held by the process of the courts of common law, has received any considerable support from judicial determinations. In the long course of the British admiralty but a single case (*The Flora*, 1 Hagg. Adm. 298) is found where such interference has been attempted ; and the utmost that has been, or can be, claimed for that case is a tacit recognition of the power arising from the fact that it was not questioned by the counsel for the creditor in the common-law court. But the report gives a very good reason why it was not questioned ; and why the creditor preferred a sale by the marshal instead of the sheriff ; and, also, in-

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forms us that by an understanding between the parties, the vessel remained in the actual custody and possession of the sheriff's officer, so that the creditor claimed, and actually obtained the satisfaction of his execution after the claims preferred in the admiralty court were paid. Under these circumstances, this case, aside from its entire want of applicability to the rights and powers of courts acting under separate and independent sovereignties, can, certainly, be regarded as of very little value.

The only cases decided in this country which have been brought to our notice by the defendant's counsel, or of which we have any knowledge as favoring, to any extent, his position, are the *Spartan*, Ware, 147; *Certain Logs of Mahogany*, 2 Sum. 592, and *Wall v. The Royal Saxon*, 2 Am. Law Reg. 324.

Neither of these cases furnishes any authority for the action of this court. They were all decided by the inferior courts of the United States, and the positions taken and the reasons assigned [122] are entitled to the same respectful consideration as though they had been advanced at the bar; no more, and no less. As the case of the *Royal Saxon*, in the district court for the eastern district of Pennsylvania, was decided last—is the most nearly in point, and is considered with much the most ability—I shall refer, at any length, only to that case. The libel was in admiralty for seaman's wages and supplies. Before the proceeding was instituted the vessel had been taken into custody upon process issued by the Supreme Court of Pennsylvania, on proceedings in foreign attachment, commenced in that court against her owners. An application being made to the district court for an interlocutory order of sale, the attachment creditors intervened, and insisted that, pending the attachment in the state court, the vessel was not liable to arrest upon the proceedings commenced in the district court, and therefore the order of sale ought not to be made. Judge Kane made the order, notwithstanding the objection, and commences his opinion by affirming that "the authority of the courts of admiralty to make seizure and sale of vessels, while under attachment from the courts of common law, has not hitherto been questioned in England or this country." When it is considered that he is able to refer only to the case of the *Flora*, in England, and to that of the *Spartan*, in which it is expressly stated that the regularity of the proceeding was not questioned by the attaching creditors, and to some equivocal *dicta* in the case cited from Sumner; it must be deemed a very slender

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foundation upon which to base so broad an assertion. Indeed, the result of his own reasoning strips it of its latitude, and confines it to proceedings instituted to enforce a right to, or lien upon, the property paramount to that upon which it is held in the common-law court, and which such court may be incompetent to notice and enforce. He considered the proceeding in attachment as essentially *in personam*, and the writ as binding only the interest of the defendant in the property, whatever that might be; and, therefore, not extending to the paramount lien or interest of the seamen for their wages, which he compares to the title of a third person, not a party *to the proceeding. We need not stop to inquire what [123 weight is due to most of these considerations. The proceeding upon which this boat was held was undeniably *in rem*. It is as true of this proceeding, as though it had been in admiralty, that "the subject-matter of the controversy is the *res* itself. It passes into the custody of the court. All the world are parties, and the decree concludes all outstanding interests, because all are represented." The court having the boat in custody had full power to recognize and enforce the seaman's paramount lien, if he saw fit to ask it, in the same manner and to the same effect as a court of admiralty. What more could the district court have done? If the material man had seen fit to commence his proceedings in that court (as he might have done), and the seaman had commenced his in the state court (as he also might have done), would it have authorized the sheriff to have taken the boat from the custody of the marshal? It certainly would, if the right depends upon the paramount lien; but I presume such an application of the doctrine would be at once repudiated. If the proceeding of the material man had been instituted in the district court, it would have compelled the seaman to present his claim there before the proceeds of the sale were distributed, or lose his lien upon it.

What greater hardship in requiring him to do the same thing when the former was rightfully and legally proceeding in the state court? The state had the right to provide this remedy for both the claims. She had done so; and Congress had provided that the suitor, at his election, might pursue it. Did that body, after giving the right, intend that it should be defeated by the interference of their own courts, invested with concurrent jurisdiction, which owed their existence, and all the powers they possessed, to their sole authority?

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The suitor was not a tenant at will in the state court. He had a perfect right, either with or without the saving in the act of Congress, to proceed there; and having elected to do so, there was no higher law, and no sovereignty more sovereign, than that he was [124] invoking to defeat the jurisdiction *the court had acquired. The whole argument in favor of such interference is founded on a mistake. It is very true that the property of A can not be taken for the debt of B. Constitutional guaranties make the government as incompetent to do this as the humblest individual. But the seaman has no such property in or title to the vessel on which his wages are earned. He has a highly favored claim, which gives him a *privileged lien* upon the vessel and its proceeds, with the right to have it converted into money for his payment. He could not sustain an action of replevin, founded upon an assertion of title or ownership to recover the possession from the owner, much less when the possession of the owner has passed into the custody of the law, and the vessel is in process of being converted into money by a court, with perfect ability to secure him all his just rights, can he be permitted to defeat other creditors equally meritorious by interfering with the possession upon which its jurisdiction depends. Such a course would not only be without right, but without excuse.

This view of the subject is rendered nearly conclusive by authorities which we are bound to respect. *Dawson v. Holcomb*, 1 Ohio, 275, was a motion to amerce a sheriff for failing to pay over money made on execution. He answered that it had been attached in his hands as the property of the judgment creditor. The court held the defense insufficient, and say: "While the money remains in the hands of the officer, *it is in the custody of the law*. It does not become the property of the judgment creditor till it is paid over, and consequently it is not liable to be attached as his. The writ of attachment could not supersede the execution, or release the sheriff from a literal compliance with its command, which required him to bring the money into court, so that it might be subject to their order."

This case was decided upon the settled common-law principle that property in the custody of the law is not subject to seizure upon legal process. The doctrine is placed upon still broader [125] grounds by the Supreme Court of the United *States, in its application to the respective action of the state and federal courts.

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Judge Story, in his Commentaries on the Constitution (vol. 3, sec. 1751), lays down the general proposition that, "in the exercise of the jurisdiction confided respectively to the state courts, and those courts of the United States (where the latter have not appellate jurisdiction), it is plain that neither can have any right to interfere with or control the operations of the other." The same principle is still more pointedly stated by Justice McLean in *Prigg v. Pennsylvania*, 16 Pet. 663. He says: "The powers which belong to a state are exercised independently. In its sphere of sovereignty, it stands on an equality with the federal government, and is not subject to its control. It would be as dangerous as humiliating to the rights of a state to hold that its legislative powers were exercised to any extent, and under any circumstances, subject to the paramount action of Congress. Such a doctrine would lead to serious and dangerous conflicts of power." In *Hogan v. Lucas*, 10 Pet. 400, the property was first levied upon by the sheriff, and after being delivered to a claimant upon a forthcoming bond, was seized in execution by the marshal. The court say: "Had the property remained in the possession of the sheriff, under the first levy, it is clear the marshal could not have taken it in execution, for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other.

"A most injudicious conflict of jurisdiction would be likely often to arise between the federal and state courts, if the final process of the one could be levied on property which had been taken by the process of the other.

"*No such case can exist*; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and *especially by an officer acting under a different jurisdiction.*"

*In *Peck v. Jenness*, 7 How. 612, the property was attached [126 upon mesne process, under the laws of New Hampshire. Pending the proceedings, the defendants became bankrupt, and were regularly discharged from their debts by the district court. On the petition of the assignee, that court decreed that this attachment was not a lien on the property in the custody of the sheriff, and ordered him to deliver it up to the assignee, or to account to him for its value.

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The question was, whether this was a sufficient defense to further proceedings in the state court. The court, affirming the judgment of the superior court of the state, held it was not; and, after adverting to the fact that the state court was an independent tribunal, not deriving its authority from the same sovereign, and, as regards the district court, a foreign forum, in every way its equal, uses this emphatic language :

"It is a doctrine too long established to require the citation of authorities, that where the jurisdiction of the court, and the right of the plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but necessity. For, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy. Neither can one take property from the custody of the other, by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

To the same purpose, and no less explicit, is the opinion of Mr. Justice Thompson, in the case of the Robert Fulton, 1 Paine, 620. In that case, the ship was seized and taken into custody by the sheriff, at the suit of certain material men, upon process issuing from a state court, under a statute very similar to the law of this state. While so in custody, other material men instituted proceedings in the district court, under which she was taken from the sheriff by the marshal. The judge says :

"If the sheriff by virtue of his warrant had attached and taken into his possession the ship on the 10th of May, as he has returned, 127] it is in no way explained how the marshal *could, the day after, seize and take into his possession the same vessel, and proceed to sell the same, under the orders of the district court. The right and authority of the sheriff under the process directed to him to attach the vessel, can not be questioned, and if he had so done, the ship was in the custody of the law, and the marshal could have had no authority to take it out of the possession of the sheriff. If he found the vessel held by the sheriff under his attachment, he should have so returned to the district court upon his process, and all further proceedings of the district court would have been arrested, and no conflict of jurisdiction could have arisen. The proceedings were *in rem*, and the sentence of the court must act on the thing itself and could not be executed, unless possession

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of it was taken. It is the necessary result of proceedings *in rem*, that the thing in litigation must be placed in the custody of the law. It must be in the possession or under the control of the court. And the right to maintain the jurisdiction must attach to that tribunal which first exercises it and takes possession of the thing in litigation. This course is indispensable in order to avoid a clashing of jurisdictions."

To these cases in the federal courts, establishing principles which, we think, must control the one at bar, we should not omit to add the case of *Carryl v. Taylor*, 2 Am. Law. Reg. 333, decided by the Supreme Court of Pennsylvania, sitting at *nisi prius*.

The action was replevin, and the suit was brought to recover possession of the barque *Royal Saxon*—the subject of controversy in the district court, in the case to which I have referred. The plaintiff was the purchaser under the proceedings in attachment in the state court, and the defendant under those of the district court.

The jurisdiction of the state court, and its right to retain the possession of the vessel against the process of the district court, as well as the title of the plaintiff, were fully sustained in a very able opinion by Mr. Justice Woodward, to which I can not do more than refer, and express the concurrence of this court in its reasonings and conclusions.

*I have thus, at much greater length than I had intended, [128 stated the reasons and authorities upon which we rely in coming to the conclusion, that the defendant was wholly unjustified in surrendering the boat in his custody to the marshal.

We regret the necessity that compels us to affirm his liability, as he probably acted under a mistake as to his duty. But he was bound to know his duty; and whether mistaken or not, the plaintiff lost his debt by his failure to perform it, and we have no right to deny him a remedy. The sooner ministerial officers understand, the better it will be for them, that the law places at their disposal, the force necessary to enable them to execute process in their hands, according to its command; and that they always act safely when they act under the direction of the court from which it issues, and never without it.

But if we could deny this plaintiff a remedy, we should still have no right (and as little inclination) to diminish the power of

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the state, to discharge one of the most sacred of its obligations by doing justice to the suitors in its courts.

How little this very beneficial statute would be worth, if we yielded to this interference, is illustrated by this case. The record informs us, that the marshal, at the request of the parties, removed the boat from the county into Lake Erie, when the claim of the seaman was settled, and the boat delivered to the master; who never afterward suffered it to come within the limits of the county of Wood. There can be very little doubt, that the process of the district court was used, for the mere purpose of withdrawing the boat from the reach of the creditor in the state court. If so, what was true in this case, will be true in every other, at the election of the master or owner; as a seaman may always be found, with a claim real or pretended, upon which to obtain the process. We must hear better reasons than we have yet heard, or can imagine, before we consent, thus to place an honest creditor in our courts at the mercy of his debtor.

The judgment of the court of common pleas is reversed, and the cause remanded for further proceedings.

129] *DANIEL GILBERT v. CALVIN G. SUTLIFF ET AL.

Where A had transferred his store of goods to B, upon certain trusts, in one of which the complainants below were beneficially interested, and had also assigned to B a contract for other property, for the express purpose of indemnifying said complainants, they had a right to call B to account in chancery; and it was not necessary, before doing so, to obtain a judgment against A.

If, in a bill filed in such a case as that supposed, on an averment that B fraudulently holds in his possession, in trust for A, a large amount of real and personal estate, and is also largely indebted to him, it is sought to subject this property and indebtedness to the complainants' claims, the objection to the bill, that it should have followed a judgment against A, should be taken at the hearing, if not before. It comes too late after final decree.

A court is not bound to dismiss a bill on account of a misjoinder, where the defect is not specially pointed out. It may do so, *sua sponte*, or it may not. Whether it shall do so or not, rests in its sound discretion.

As a general rule, a trustee is not entitled to compensation, in the absence of

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an agreement to pay. He may claim for expenses, but he must render his account, and, if not admitted, must clearly establish it. If he maladminister, and refuse to account, both compensation and expenses may be refused.

A trustee may not be accountable for an honest mistake, but where his duty is so plain that no man of ordinary intelligence could mistake it, he is responsible, if he has that intelligence. He can not shield himself from responsibility by doubts that he takes no measures to either verify or dispel

BILL of review, reserved in Summit county.

The object of the bill is to reverse a decree of the court of common pleas for Portage county, to which the case had been certified from Trumbull county. The original bill was filed by Ruell Miller, Levi Sutliff, and Calvin G. Sutliff, against Garry Lewis, Daniel Gilbert, and others. It alleged that in December, 1834, the complainants, together with Chauncey H. Wilcox (since deceased), Matthew Acheson, and Samuel H. Sutliff, became sureties for said Garry Lewis to the Western Reserve Bank, on a bill of exchange, discounted for Lewis at the bank for the sum of \$5,000, on which two judgments, one against maker, and the other against indorsers, were obtained at the November term of the Trumbull common pleas, 1835. The bill further alleged, that the property of complainants, or some of them, had been seized and sold on the judgment against them, and two-thirds of its appraised *value, [130 and at a large amount of costs, to apply in satisfaction of said judgment, and had been sacrificed, and that complainants were then liable to have their property taken to satisfy said judgment, etc. The complainants averred that the said Garry immediately after procuring them to indorse, as aforesaid, fraudulently divested himself of all his property, both real and personal, without making any provision, either for paying the draft, or indemnifying complainants, and had been ever since bankrupt, and worthless, having no property subject to levy on execution at law. They further represented that Daniel Gilbert, at the time of the indorsement of the draft aforesaid had, and held in his possession, "and still holds the same" fraudulently, as against complainants, lands, tenements, goods, chattels, and property, and choses in action of the said Garry Lewis, and in trust for him, the said Garry, or is indebted to the said Garry for the same in case he, the said Gilbert, claims title thereto. The bill proceeds to describe a tract of 140 acres, east of Warren, for which Gilbert agreed to pay Garry Lewis \$100 per

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acre. And the bill alleges, that about the same time, the said Gilbert took a conveyance from the said Garry of another farm, known as his homestead, in Howland township, containing about 400 acres of land, and agreed to pay Lewis therefor \$30 per acre. The bill further alleges, that at the time last aforesaid, Gilbert held, and that he still holds, the equitable interest of said Lewis in a certain lot in Warren, with buildings thereon, known formerly as the Lowe property. It is averred that the said Lewis, about the time that complainants and the said Chauncey H. Wilcox indorsed for him, assigned said equitable interest in the Lowe property to Gilbert, in trust to indemnify said indorsers, and Gilbert was, by the terms of the assignment, to surrender said interest to the indorsers on demand, or cause the same to be sold, and the avails to be applied to indemnify them. It is further averred, that after indorsing, as aforesaid, and being apprehensive that they should have said draft to pay, complainants demanded of Gilbert said equitable interest, **131]** and performance *of said trust, according to its true intent and meaning; but Gilbert refused to surrender said equitable interest, nor would he either sell the said interest himself, or suffer the same to be sold, but still holds the same in violation of his trust. It is also alleged that had Gilbert performed his trust in good faith, on demand by complainants as aforesaid, or within a reasonable time thereafter, the said trust property would have been amply sufficient to indemnify complainants and the said Chauncey H. Wilcox; but, in consequence of Gilbert's refusing to perform the trust in good faith, the property has been so deteriorated in his hands, by changing in its value, and by neglect thereof, as well as by natural decay, that it is at this time but of little value. It is averred, that by reason of his breach of trust, Gilbert should be compelled to indemnify complainants and the said Chauncey H. Wilcox against their said indorsement.

Complainants further state, that Lewis, on or about the 19th day of January, 1836, assigned to Gilbert, in trust, a large store of goods in Warren, worth, at the time of assignment, more than seven thousand dollars, and at the same time Lewis assigned to Gilbert about four hundred tons of hay, worth more than two thousand dollars; for all which store of goods and hay, Gilbert is still indebted to Lewis.

Complainants further state, that when said judgments were rendered against them, Gilbert had, and that he still retains, a vast

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amount of other property, "both real, personal, and mixed," amounting to more than \$30,000, which justly belongs to Lewis, and which Gilbert holds in trust for him; or, if the title is vested in Gilbert, that he is indebted to Lewis for the same. It is averred that said property or its avails ought, in equity, to be subjected in Gilbert's hands to pay and indemnify complainants and Wilcox's administrators for what they have been compelled to pay and sacrifice by reason of their indorsement. Complainants aver that Gilbert is otherwise justly indebted to Lewis in more than \$12,000; and they further represent *that Lewis is possessed of an equitable [132 interest in a lot of land in the town of Vienna, in Trumbull county, being the west part of lot 47—being the same upon which he now resides—and also an equitable interest in a lot in Warren, known as the academy lot; but the complainants are ignorant of the true nature of said Lewis' equities in said Vienna land and said academy lot, and they therefore ask that Lewis disclose his true interest therein, etc.

The prayer of the bill is, among other things, that on the final hearing, the property aforesaid may be subjected to the payment of the said indorsers, and to make them good for all their losses, payments, disbursements, and liabilities, incurred by reason of said indorsement, in case the said property remains in the hands of said Gilbert, in specie; or, if he has disposed of the same, then that from his own moneys he pay the same, etc.

An amended bill made parties Matthew Atcheson and Samuel H. Sutliff, as joint indorsers with other complainants, and made other new parties not necessary to be named in this statement of the case.

The answer of Gilbert, among other things, sets up that he purchased the farm, lying near Warren, containing 140 acres, of Garry Lewis, in the spring of 1836, for \$100 per acre; that he has a title thereto, and is not indebted for any part thereof; that he purchased the farm in the township of Howland, known as Lewis' homestead, in the month of February, 1836, for the sum of \$11,500; that he now has a title to the same, and is not indebted to said Lewis for any part thereof. It also avers that about the time Calvin G. Sutliff and the other indorsers indorsed the draft for which they are liable, Lewis had about two hundred tons of hay, which he was about to send to a southern market, and respondent understood that it was agreed that Calvin G. Sutliff should go to the South with the hay,

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sell the same, receive the avails, and, upon his return home, apply the same in payment of the said \$5,000 draft. It further states, that on the 19th day of November, A. D. 1835, Lewis assigned, in 133] *blank, a written contract, between himself and Leicester King, for the sale of the Lowe property in Warren, then owned by said King, upon which contract Lewis had paid \$538. Said contract and property was to be held by respondent, in trust, to secure and indemnify said indorsers, if they should be compelled to pay any moneys in consequence of having indorsed the draft for Lewis. The answer denies that the complainants called upon him, and demanded of him said equitable interest in the said property, and that he should perform the trust; but it admits that Milton Sutliff, as attorney for some two or three of complainants, called upon respondent some time after the assignment was made, and demanded said contract, stating that he would deliver the same to the sheriff to be sold as personal property. But as he did not exhibit, nor offer to deliver up the receipts which respondent had given when the contract was assigned and delivered to him, he refused to deliver up the same; and also because he believed that if he did so deliver up the said contract, himself and the other indorsers and bail for Garry Lewis would lose the security which they held by virtue of said contract, without materially lessening their liabilities; and because respondent doubted whether the sheriff could sell the said contract, under the assignment, without the intervention of a court of equity. The answer also states that respondent had become surety for the payment of the \$5,000 draft by giving bond for \$10,000 to the bank, conditioned on the payment of said draft by the drawees, drawer, or indorser. Respondent further says that if he had given up the assignment, and allowed the property to be sold for the benefit of complainants and Chauncey H. Wilcox, or sold the same himself, it would have sold but for little more than sufficient to pay King his demands against the same; and instead of having suffered the property to deteriorate and decay, by neglect, etc., large and valuable improvements have been made upon the same by Garry Lewis, in whose care it has been ever since the assignment; and that said property 134] is *now more valuable than it was when Milton Sutliff demanded the contract and assignment of respondent.

The answer further avers that the respondent purchased the store goods mentioned in the bill, for a valuable consideration of

Lewis; that the purchase and sale were, in all respects, a *bona fide* business transaction; and that he does not now, nor never did, hold said goods in trust for Lewis; but that, after the sale and transfer of the said goods, the complainants, or some of them, broke open respondent's store-room, and caused said goods to be seized and sold by the sheriff as the goods of Lewis; and afterward respondent prosecuted complainants and one Henry W. Smith for the trespass; and recovered damages against them for carrying off and injuring his goods.

The answer also states that Garry Lewis, being indebted to respondent in the sum of \$1,200 upon a judgment bond, respondent purchased of said Lewis a quantity of hay to secure said debt, and took a bill of sale therefor; that afterward the complainants caused said hay to be seized and sold by the sheriff under an execution against Lewis and others; and that respondent instituted a suit against complainants for the trespass, which suit was afterward amicably settled before trial.

The answer denies that respondent holds property to the amount of \$30,000 in trust for Lewis, or any other amount; and it also denies that respondent is indebted to the said Lewis in the sum of \$12,000, or any other amount.

The answer admits that Lewis has an equitable interest in the land in Vienna township; but respondent holds a mortgage upon said land—in which other land is included—formerly given by Lambert W. Lewis to Calvin Cone and others, as security for himself for claims he holds against Garry Lewis, and for having become security for said Lewis; and also as security for others who have claims against the said Lewis, whose claims are in respondent's hands.

The answer admits that Lewis has an equitable interest in the academy lot in Warren; but respondent avers that he *has [135 a lien upon Lewis' interest in the lot to secure him for money advanced upon a judgment in favor of John W. Seely, upon which respondent was security—said academy interest having been conveyed to respondent to secure him for so becoming surety.

(The terms of the transfer of the Lowe property sufficiently appear in the opinion of the court.)

At April term, 1843, the cause was referred to Horace Wilder, Esq., as special master commissioner, with power to take testimony of witnesses and to examine the parties, and to report: 1. Whether

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the complainants, or either of them, were the sureties of the said Garry Lewis, as alleged in the bill; and if so, whether said Garry Lewis has saved them harmless; and if not, wherein, and to what extent they, or either of them have been damnified; how much they, or either of them, have paid, or are liable to pay, by reason of becoming such surety? 2. Whether said Garry Lewis is now, and was at the commencement of this suit, insolvent or otherwise? 3. Whether said Daniel Gilbert, at the time said complainants became sureties as aforesaid, or at any time thereafter, held in his hands any property, real or personal, for the security of said complainants, or either of them; and if so, what property, and what were the terms on which he held it? Whether said property has been applied for the indemnity of said indorsers, and if not, whether said property, or any of it, has been demanded by said indorsers, or either of them, of said Gilbert, and if so, at what time, and whether said Gilbert refused to have said property so applied, and at what time, and what was the value of said property at the time of said refusal, and what is its present value, and whether the same, or any part thereof, or the proceeds thereof, is now in the hands of said Gilbert; and if not, what disposition has been made of it; and whether said Gilbert has received from said trust property any rents or profits of any kind, and if so, how much? 4. Whether said Daniel Gilbert, at the commencement of this suit, had in his hands [36] any property, whether real or personal, *belonging to said Garry Lewis, or in any manner held any such property in trust for the use or benefit of said Lewis, and if so, what property, and what was its value? 5. Whether said Daniel Gilbert, at the commencement of this suit, was indebted to said Garry Lewis in any amount, for any cause or consideration whatever, and if so, what amount? And that he state fully an account between said Lewis and Gilbert, specifying, if any, the property, received by said Gilbert from said Lewis, and the price paid, or agreed to be paid for the same, together with any indebtedness of said Lewis to said Gilbert, and any payments made by said Gilbert for any such property.

The report of the master embraced the following facts: That the complainants, together with Chauncey H. Wilcox, Samuel H. Sutliff, and Matthew Atcheson, did indorse for Garry Lewis as sureties for him, a bill of exchange for \$5,000, which Lewis procured to be discounted; that no part of said bill having been paid, the holders, the Western Reserve Bank, instituted suits thereon, and recovered

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a judgment, first, against said Lewis for \$5,461.34, besides costs; and, second, against all said indorsers, except Samuel H. Sutliff, who had not been served with process, for the same amount of damages and costs.

An execution upon the judgment against Lewis, was issued in January, 1836, and by the direction of the complainants it was levied, together with others, upon a large quantity of goods, and merchandise, and hay, as the property of Lewis; but which were afterward claimed by Gilbert under bills of sale, executed by Lewis, to him, January 19, 1836. The said property was sold, on the executions, for the sum of \$3,135.73, to apply to said judgment and costs, leaving, after the deduction of the increased costs, the net sum of \$3,028.07 to be so applied. Nothing further was ever paid on the judgment by Lewis, and the balance still remains due, except so far as there should be a credit thereon for moneys collected of the indorsers. That balance, deducting said credit, is found to be, including interest, the sum of \$2,277.09, *with which [187 amount Gilbert is credited as the assignee of the Western Reserve Bank.

On the 19th of May, 1838, on an execution issued against the indorsers, the land of Calvin G. Sutliff was sold for \$1,198. Said land was appraised at the sum of \$1,796.66, and the same appears to have been the fair value of the land. Crediting the sureties with the amount thus made and applied, and also with the sum of \$3,028.07, the amount made on the judgment against Lewis, over and above the costs, there will remain due on said judgment against the sureties, computing interest to October, 1843, the sum of \$2,292.52, which the complainants are liable to pay.

Before the discounting of the draft by the bank Gilbert became responsible for its payment, by executing a bond so conditioned. In March, 1839, at the instance of the bank, Gilbert assumed, and paid to the bank, the balance then due on the judgment (\$1,972.12), and took assignments from the bank to himself of both said judgments.

On the 10th of July, 1838, Calvin G. Sutliff purchased back his land of the bank, for the sum of \$1,280.66.

At the August term of the Supreme Court, 1839, in Trumbull county, Gilbert obtained judgment against complainants, Chauncey H. Wilcox, and Henry W. Smith, (sheriff,) in an action of trespass; damages, \$5,354.61, and costs; the said damages being the estimated value of the goods and merchandise seized and sold as the property

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of Lewis, as before mentioned, with interest. That judgment has been paid in full to Gilbert, the complainants having each contributed one-fourth part. But, though the payment thus made by complainants was a remote consequence of their having indorsed the draft, the master is of opinion that a court of equity can give them no relief, and that they have not thereby been "damnified" within the meaning of the interlocutory decree in the cause.

Lewis, therefore, has not saved the complainants harmless for be-
138] coming sureties for him. The sum paid by Calvin G. *Sutliff in consequence of becoming such surety, by the sale of his land will, with interest to the first day of next term, amount to \$1,589.75. The complainants are still liable to pay the balance of said judgment, amounting, with interest to the first day of next term, to \$2,292.52.

The master finds that the proper rule for estimating the damages of Calvin G. Sutliff, is the amount for which the land sold; but if the court should be of opinion that the rule ought to be to estimate the *value* of the land so sold, then said Sutliff would be damnified, including interest, the sum of \$2,384.71; and if the rule shall be the rate he paid the bank for his land when he repurchased it, then it amounts to \$1,688.54.

Lewis was insolvent at the commencement of this suit, and has been ever since. Said Lewis had, on the 19th of November, 1835, a written contract from Leicester King for the purchase of the Lowe property. On that day Lewis assigned and delivered said contract to Gilbert, and at the same time Milton Sutliff, as attorney for indorsers, received from Gilbert a writing acknowledging the receipt of such assignment and contract. The object of said assignment, in substance, was to secure the indorsers of the draft, and also to secure Gilbert for his liability to the bank on the bond. The contract was to be held by Gilbert for the security of the indorsers, and if any execution should be issued against any of them by which they should be compelled to turn out property to the sheriff, and Lewis, having been informed thereof, did not immediately pay the amount demanded, or turn out sufficient property to satisfy the execution, then and in that case said contract was to be delivered to the sheriff, on such execution, and sold to satisfy the same. The said contract and property have not been applied for the indemnity of said indorsers, or either of them.

In January, 1836, the sheriff called upon the indorsers for property to answer the execution aforesaid, on the judgment for the

bank; and Milton Sutliff received from them, but not from Acheson, an order on Gilbert for said contract. He *thereupon de- [139 manded the contract of Gilbert, who refused to surrender it to the sheriff, or to the indorsers. In April or May, 1838, and while his land was under the levy by which it was afterward sold, Calvin G. Sutliff requested Gilbert to surrender said contract to the said indorsers, but he refused. There is no evidence to show whether his receipt for the contract was produced and tendered to Gilbert at the time when the contract was demanded of him. The said contract is still in the hands of Gilbert, but the property embraced in it has been taken back by the vendor, Judge King (under what arrangement does not appear), and there is no evidence that Gilbert has ever received any rents or profits from said property. The said property consisted of an acre of land and a large house and out-buildings. About \$10,000 was expended in the erection of said building and other improvements on the lot. The interest of Lewis was derived from a contract to purchase the same of King for \$4,000, to be paid, \$1,000 in goods, on demand, and the balance in nine equal annual payments, with interest, the first of said annual payments to be made 24th of September, 1836. There was paid by Lewis, in goods, and indorsed on the contract, \$538, and within two years from the date of said contract, September, 1834, there had been paid, including said \$538, about \$1,000; but whether any payment, other than that first mentioned, was made, prior to February, 1836, does not appear. On the 1st of May, 1838, there was due, and to become due to King for the property, about the sum of \$3,800, of which there was then due about \$1,360. Subject to King's lien for said balance of the original purchase money, Lewis was the equitable owner of the property.

According to the estimates of thirteen witnesses for complainants, the said property would have sold, in 1836, for from \$10,000, to \$12,000. In 1837 or 1838, Lewis, according to his statement to King, was offered \$10,000 for it, but refused to sell for less than \$12,000. On the other hand, seven witnesses for respondent estimate the said property at from \$3,000 to \$4,500 value. The complainant's witnesses *admitted, on re-examination, that at [140 forced sale, the property would not produce more than \$5,000 or \$6,000. The master, in view of all the evidence, reports, that in February, 1836, the equitable interest of Lewis, in the property, would have sold readily for \$2,500 in money; and, that in 1838,

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that sum was a fair estimate of the value of said equitable interest. The price of property had declined somewhat, but improvements had been made to the amount of the difference.

The property having been taken back by the vendor, the interest of Gilbert at the time of the report, if any, was of little value.

The master finds, that at the commencement of this suit, Lewis had an interest in the academy lot in Warren, but the said interest was of little or no value, it being burdened with liens to Gilbert, and conveyed to him to secure money paid, and liabilities assumed.

The master further finds, that at the commencement of this suit, Gilbert held in trust for Lewis, a mortgage upon the fifty acres of land in Vienna, and other lands, given by Lambert Lewis to Calvin Cone and others, to secure them for indorsing for him a note to the Western Reserve Bank for \$1,700. At the date, October 1, 1832, said debt to the bank had been reduced by Lambert Lewis, by payments, to \$715.88. In 1827, the said Cone and others, had assumed the debt to the bank, giving their own notes for it, and they instituted suit to foreclose the mortgage, by Roswell Stone, their attorney. Said Stone paid to the bank, October 1, 1832, the amount, \$715.88, then remaining due. At the joint instance of Lambert W. Lewis and Garry Lewis, Gilbert had purchased the said mortgage and the debt it was given to secure, in September, 1829, and on the 29th of that month, he received an assignment of said debt and mortgage from the mortgagees. Gilbert, in consideration, was to pay the amount due the bank, and the costs of the suit to foreclose—nothing was to be paid to the mortgagees. The balance of the debt, and the costs of the suits to foreclose, 141] *could not have exceeded, in the judgment of the master, \$800; and if more than that was paid by Gilbert, it was probably paid to Lambert W. Lewis. For some unexplained reason, however, Lambert Lewis and Garry Lewis, at the time of the purchase of the mortgage by Gilbert, and subsequently, treated said mortgage as if the whole amount of the debt it had been given to secure, was due and unpaid. Lambert W. Lewis, at the time of the purchase, acknowledged the whole amount to be due, in a writing given to Gilbert; and in the receipt given by Stone to Gilbert, the consideration is expressed as \$1,900.

As an inducement to Gilbert to purchase said mortgage, Garry Lewis promised to pay it, if Lambert did not do so; and in fulfillment of said promise, he bought the mortgage of Gilbert and exe-

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outed to him his note therefor, bearing date January 3, 1833, for \$2,884.14. "This," says the master, "is extraordinary, and the reason therefor unexplained. There was but about \$800 due on the debt for which the mortgage was originally given, including costs of suit to foreclose. Gilbert, in September, 1832, paid, at the most, but \$1,900; yet, in January following, Garry Lewis, it is asserted, paid Gilbert for the same \$2,884.14." This note for \$2,884.14 was afterward paid in part, by two notes of \$1,000 each, executed by Lewis to Gilbert in December, 1833, and amounting, with interest, in February, 1836, to \$2,265.93, which was then credited to Gilbert on the purchase money of Garry Lewis' homestead farm in Howland township.

The mortgage was never assigned to Lewis, and the master reports that Gilbert has liens upon it, amounting to \$2,411.88, for notes he holds against Lewis, debts of Lewis, and liabilities assumed by Gilbert for him. The value of said mortgage does not appear.

The master further reports that Gilbert paid Lewis in full for the homestead farm, by giving up to him 23 notes of hand, by assuming and paying to Green and Pear \$1,857.84, due them by Lewis, by a note against David Acheson, and *by an in- [142
dorsement on a note held by Gilbert against Lewis, amounting in all to \$11,500.

Also, that Gilbert paid Lewis in full for the Wheeler Lewis farm; by paying Leicester King \$3,039.68, part of the purchase money of said farm, due from Lewis to King; by giving Lewis a farm in Rossetta, 155 acres, at an agreed price of \$2,650; by giving up notes against said Lewis; by paying off liens upon part of said farm; and by giving to Lewis his (Gilbert's) own notes for the balance, together with \$1,000 for the rent of said farm and the homestead farm for one year after the sale.

The master reports that the value of the goods and merchandise sold to Gilbert by Lewis, in January, 1836, was estimated at \$4,500. That the object of the sale was to secure him for indorsement for Lewis, amounting to \$3,350, and for the further purpose of securing him for his liability to the bank, for the ultimate payment of said \$5,000 draft. That by the terms of said conveyance, the said Gilbert was to have the liberty of selling said property, and applying the proceeds to satisfy certain debts of the said Lewis. Also, that on the 19th day of January, 1836, Lewis con-

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veyed to Gilbert a quantity of hay, to secure the payment of a certain bond for \$1,200, with interest, made June 5, 1832, by Lewis, in favor of Gilbert; and also to secure Gilbert for the bond given to the bank for said \$5,000 draft. Said hay, estimated to be about 350 tons, was to be in the control of Gilbert, to be removed as he might see fit, and sold for not less than \$5 per ton, the proceeds to be applied to the payment of said bond for \$1,200, held by Gilbert, and the remainder to be paid by Gilbert to the bank on the \$5,000 draft. The master also recites the seizure and sale of said hay by the sheriff, at the instance of complainants, and the action thereupon, brought by Gilbert, which was settled, upon what terms does not appear, except as to costs, and there is no evidence to show that Gilbert ever realized anything upon account of said hay.

143] *The master then states an account between Lewis and Gilbert, in which, among other things, he allows Gilbert \$750 for his trouble in collecting and disbursing, etc.; and from which it appears, that at the commencement of this suit, Lewis was indebted to Gilbert, including said allowance of \$750, the sum of \$2,765.72.

The exceptions of Gilbert to this report were, in substance, as follows: 1. The master has reported the judgment in favor of Gilbert against Smith and the complainants as paid and satisfied; 2. The master has wrongly estimated Lewis' equitable interest in the Lowe property; 3. The master has found a balance in favor of Lewis, and against Gilbert, arising from the merchandise transferred to Gilbert, of \$745.68, applicable to the payment of the bank debt, while the testimony shows that Gilbert has paid more than \$2,000 of said debt; 4. The master allowed Gilbert only \$750 compensation, which is less than one-half of what he is entitled to receive.

The complainants excepted in substance as follows: 1. The master reported that complainants had been damnified only to the amount of \$1,589.75, in consequence of their becoming sureties on the draft for Lewis, whereas, it is apparent, from the evidence, that complainants have been damnified, in consequence thereof, to an amount, including interest, exceeding \$5,000; 2. The master has reported that the equitable interest of Lewis in the Lowe property was, in 1836 and 1838, only worth \$2,500, when it was, in truth, of the value of \$4,500; 3. The master has allowed to Gilbert, in the account relative to the goods and merchandise transferred to him

by Lewis on the 19th of January, 1836, a credit for payments made to certain creditors of Lewis, of \$5,105.82, when he is only entitled to a credit of \$4,914.45; 4. The master, in the same account, has allowed Gilbert \$750 for services and expenses in converting said goods into money, and paying the same over, which allowance is unreasonable, and made without any evidence or vouchers to sustain the same.

*The decree in the original cause overruled all Gilbert's exceptions to the report, and likewise overruled the third exception taken by the complainants. The complainants' other exceptions were sustained, and the court found that the complainants had been damnified, in addition to the amount found by the master, including interest to October 1, 1833, in the sum of \$4,425.79, making the whole amount of their damnification, including interest, \$6,015.54. The court further found that the value of the equitable interest of Garry Lewis in the Lowe property, in February, 1836, and May, 1838, at the times when the contract for the same was demanded by said sureties of Gilbert, was of the value of \$4,000; and the court further ordered that the sum of \$750 allowed by the master to Gilbert for converting the merchandise into money, etc., be disallowed, thereby leaving in the hands of said Gilbert, including interest to the 31st of October, 1843, of said trust fund, arising from said goods, the sum of \$1,494.68; and it ordered that the master's report be corrected and reformed accordingly, and when so corrected and reformed, the said report be confirmed; and the cause was continued. At the October term, 1844, the cause was further continued. At the April term, 1845, on the motion of the complainants, the cause was certified to the Supreme Court, there not being a quorum of disinterested judges in the court below, by reason of Eber Newton, president judge, having been of counsel in the cause, and Frederick Kinsman, associate, being a party defendant. At the December term, 1845, the cause having been remanded back by the Supreme Court, it was certified to the county of Portage, there being no quorum to try the cause for the reasons before stated.

In the court of common pleas of Portage county, a decree was rendered on the final hearing, confirming the decree of October, 1843, and finding that the complainants have been damnified by indorsing the said draft for Garry Lewis, in the total sum of \$7,627.65, including interest to the date of this final decree. The

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court decrees that Garry Lewis pay said sum to the complainants, [145] within twenty days from the rising *of the court, and find that it ought to be shared among the complainants and the administrators of Chauncey H. Wilcox as follows: First, the sum of \$2,011.40 to be paid to Calvin G. Sutliff as the amount with interest for which his lands were sold; and that the residue of said fund be equally divided and shared between all the complainants and the administrators of said Chauncey H. respectively. The court further find that Garry Lewis is insolvent; and the court also find that Daniel Gilbert was made trustee by said Lewis, and that the said Gilbert, while holding the trust property, the land contract executed by King to Lewis, in February, 1836, and in May, 1838, wrongfully, and in violation of his duty as trustee, and in disregard of the terms of his trust, refused to suffer said trust property to be subjected to the benefit of complainants at their request, and when the complainants had a right to have the same so subjected; and the court find that the complainants were, in February, 1836, and in May, 1838, damnified by reason of his said disregard and violation of his duty as trustee by said Gilbert, in the sum of \$4,000, which the court find that the complainants are justly entitled to with increase of interest upon the same from the last day of May, 1838, from the said Gilbert, after deducting therefrom, as a partial payment thereof, the sum of \$2,015.72, as of October 31, 1843, which the court find due the said Gilbert as the amount of principal and interest from the said Garry Lewis at that date, including the payment of the residue of said \$5,462.34, judgment to the Western Reserve Bank by said Gilbert, thus leaving due from said Gilbert, as of the 31st day of May, 1838, to the complainants upon an account then stated between them, the sum of \$3,304.28, which sum, with interest to this time, amounting to \$4,154, the court find that the complainants are justly entitled to have, and demand, from said Gilbert. And the court further find that the judgment of \$5,462.34, rendered against the complainants and said Acheson and Wilcox, as indorsers for Lewis has been fully paid; and decree that the complainants be discharged from all further liability upon [146] the same. The *court ordered that Gilbert pay the said sum of \$4,154 to the complainants within twenty days from the rising of the court, and that the sum so to be collected of Gilbert inure to the credit of Lewis upon the decree rendered against him. And the court ordered said sum to be shared by the complainants

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and the administrators of said Chauncey H. as before directed. And that said Gilbert do pay the costs of this suit.

This bill of review was filed April 27, 1849. For errors it assigns as follows: 1. The court disregarded the testimony in finding that the Lowe property, in the years 1836 and 1838, was worth \$400 over the amount due King on the contract of sale; 2. The court refused to allow Gilbert the reasonable compensation which the master allowed for turning the goods into money, etc.; 3. The court overruled Gilbert's exceptions to the report, and sustained those of the complainants; and moulded the report into such form as complainants desired; 4. The court find, in the absence of proof, and in opposition to positive testimony, that the complainants, by reason of having been sureties for Lewis, were damnified, up to October 31, 1843, in the sum of \$6,127.65, whereas, in fact and in truth, the damage complained of was occasioned by their forcibly breaking and entering Gilbert's store and carrying away his goods; 5. The court decreed that Gilbert had no right, though co-surety, and liable with others, to hold on to the contract for the Lowe property; but ought to have surrendered it up to be sold on execution, at the bidding of any of the sureties; 6. The court decreed that the Lowe property had depreciated \$4,000 since 1838, though several thousand dollars had been expended on it in improvements; and the court further decreed that Garry Lewis was insolvent, and *therefore*, that Daniel Gilbert was accountable for the depreciation of the Lowe property, when the testimony showed that he never was in possession of it, and never exercised any control over it; "but merely had possession of the paper for safe keeping, merely because he had a safe to keep it in," and the co-sureties holding his receipt therefor, never offered to surrender it up; 7. The court or- [147] dered that Gilbert should refund to the complainants the amount which they were condemned to pay as trespassers, in a suit at law wherein Gilbert was plaintiff, and they were defendants; 8. The court rendered a decree against Gilbert, when, by the law of the land, and the established principles of equity, it should have been rendered in his favor.

August 21, 1849, Calvin G. Sutliff filed a general demurrer to the bill; at the September term, 1849, the cause was heard, the demurrer sustained, and the bill dismissed with costs. Gilbert appealed. At the May term of the district court of Portage county, 1852, the cause was certified to Summit county, there not being a

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disinterested quorum of judges to hear it. From Summit county it was reserved to Cuyahoga county, and from the latter county it was reserved for decision here.

J. Crowell, and *Swan & Andrews*, for complainant in this bill of review.

Sutliff & Tuttle, *Wade & Ranney*, and *M. Burchard*, for respondents.

THURMAN, J. The assignments of error in the bill of review are numerous, but may all be comprehended under a few heads.

I. It is said that the bill of the complainants below should have been dismissed, because they have recovered no judgment at law against Lewis.

This proposition rests upon an assumption that the bill was a creditor's bill, under the chancery practice act, to reach equities. This is a mistake. It, was, for the most part at least, a bill to enforce the execution of trusts, or to make a trustee account. Lewis had transferred his store of goods to Gilbert upon certain trusts, in one of which the complainants below were beneficially interested. He had also assigned to Gilbert the contract for the Lowe property for the express purpose of indemnifying said complainants. They [148] *had a right, therefore, to call him to an account in respect to these matters, and it was not at all necessary, before doing so, to obtain a judgment against Lewis. The jurisdiction of courts of equity over trusts and trustees is plenary. It is true that the bill contained other allegations besides those relating to the trusts, of which the complainants were beneficiaries. It averred that Gilbert fraudulently held in his possession, in trust for Lewis, a large amount of real and personal estate, and was also largely indebted to him, and it sought to subject this property and indebtedness to the payment of the complainants' claims. But the decree complained of does not rest upon these averments. It is founded solely upon the trusts, of which the complainants were beneficiaries. It matters not, therefore, whether the property and indebtedness, in which they had no interest as *cestui que trusts*, could or could not have been reached without a judgment being first recovered against Lewis. It is sufficient that they were not reached.

But let it be supposed that the decree had subjected them, would it be reversible because no judgment had been recovered? We are

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not prepared to say so. Lewis neither objected to the jurisdiction, nor denied his liability. Gilbert, instead of demurring, answered fully. Both parties took testimony, the cause was referred to a master, the parties appeared before him and exhibited their proofs, first an interlocutory, and then a final deed was rendered, and yet, at no time during the litigation, although it lasted many years, was an objection raised to the jurisdiction, at least none appears in the record. Nor does it appear that, at any time, the point was made that no judgment had been recovered; nor, indeed, is that point specifically made in the bill of review. It first makes its appearance in the argument of counsel in this court. Under these circumstances, we think it comes too late. It should have been made at least in the final hearing in the common pleas, if not sooner, and if not made, the court were not bound, *sua sponte*, to notice it.

*II. It is said that Calvin G. Sutliff alone was damnified, [149 and his injury gave no right of action to the other complainants.

Were this admitted, it would only show a misjoinder of parties. But a court is not bound to dismiss a bill on account of a misjoinder, where the defect is not specifically pointed out. It may do so *sua sponte*, or it may not. It rests in its second discretion, which it shall do.

It is not true, however, that Calvin G. Sutliff was the only person damnified. We have decided, at this term, in *Acheson v. Miller*, that by the judgment and satisfaction thereof in the action of trespass, the title to the goods that were levied on, vested in the complainants, and the decedent, Wilcox, and that their title related to the time of the trespass. It was their goods, therefore, that went to pay Lewis' debt, and to the extent to which the debt was satisfied by them, they were damnified, and acquired a just claim upon him. Now it was this sum, precisely, that the court found in their favor, dividing it between the four, and in favor of Calvin G. Sutliff alone, it found the additional sum for which his farm sold. This was entirely correct.

III. It is next assigned as error, that "the court refused to allow Gilbert any compensation for turning the goods into money, when the master allowed him, on proof, \$750."

We can not say that the court erred in this. As a general rule a trustee is not entitled to compensation, in the absence of an agreement to pay; he may claim for expenses, but he must render his account, and, if not admitted, must clearly establish it; if he mal-

administer, and refuse to account, both compensation and expenses may be refused. Now, in this case, Gilbert did maladminister, and also fail to account, and it was only at the end of a long litigation, and by the decree of a court, that he was made to respond. He, doubtless, caused the beneficiaries of the trusts much more expense than he incurred in their execution. Under all these circumstances appearing in the case, we think the item was properly rejected.

150] **Lastly.* It is claimed that the court erred in charging Gilbert with \$4,000 as the value of Lewis' interest in the Lowe property at the time he (Gilbert) refused to have it sold.

Lewis held an equitable interest in that property, under a contract of purchase from Leicester King. He transferred it to Gilbert to secure payment of the bank debt, and save Gilbert and his indorsers harmless. The transfer was evidenced by a blank indorsement upon the contract, and a separate written agreement, both which were delivered to Gilbert, and constituted but one transaction. Their effect was to vest in Gilbert the equitable estate upon the trusts declared in the agreement, and to create a power to sell, to be exercised by the sheriff. As the estate was but equitable, it might well be assigned, and such a power created, without the formalities of a deed. The clause, creating the power and directing a sale, is in these words:

"It is further expressly understood by me, Garry Lewis, that if an execution should be issued against any of the persons above mentioned, whereby they, or either of them, may be bound to turn out property to the sheriff, in consequence of their liability to said bank on said debt of \$5,000, above named, and that I, Garry Lewis, am informed of the same, and do not immediately pay the amount demanded by said sheriff, or turn out sufficient property to satisfy said execution, then the King contract, which is given as security, is to be delivered to the sheriff on said execution, and sold to pay said debt."

Now this contingency did occur. An execution was issued against the indorsers, among whom were the complainants and Wilcox. Lewis was informed of it, but failed to make payment, or turn out property. These facts were communicated to Gilbert, by the attorney of some of the indorsers, and he was required to deliver the King contract to the sheriff, that the latter might exercise his power to sell. He refused to do so, and thereby prevented a sale.

To justify this refusal, various excuses are now offered, some of which seem to be after-thoughts, for nothing was heard of them at the time.

**First.* It is said, that the demand upon him was not made [151] by all the indorsers. It was not necessary that it should be. Any one of them had a right to make it.

Secondly. A receipt which he had given to the indorsers, showing the terms on which he held the contract, was not redelivered to him. But he did not ask its delivery. He said nothing about it. If that was the reason of his refusal he should have so stated, and it would doubtless have been obviated. But we have no idea that he refused upon any such ground.

Thirdly. He says that he doubted the power of the sheriff to sell. Suppose he did, what right did that give him to hold on to the contract? The trust he had undertaken required him to deliver it up. There could be no doubt of *that*. When he refused, he did so at his peril. True, a trustee may not be accountable for an honest mistake, but when his duty is so plain that no man of ordinary intelligence could mistake it, he is responsible if he has such intelligence. Besides, if Gilbert had such a doubt, why did he not take some pains to have it solved? It surely can not be that a trustee can shield himself from responsibility by doubts that he takes no measures to either verify or dispel.

Fourthly. It is said that the sheriff could not have sold the estate upon an execution, and, therefore, the direction to deliver it to him, upon the execution, was nugatory. It is true, that he could not have levied upon it, but the power authorized him to sell it, and this power was not defeated, or prejudiced, by the expression that the contract should be "delivered" to him "on said execution." If anything more than a sale and a delivery of the contract, indorsed as it was to the purchaser, would have been necessary to pass title, it would have been supplied by an assignment by Gilbert, to whom the estate had been transferred upon trusts, one of which was that it should be thus sold. And it would have been his duty to make such assignment, especially as he could have done so without incurring responsibility.

**Fifthly.* It is urged that the property would have been sac- [152] rificed by a sale. There is not a tittle of evidence that warrants this assumption. Besides, Gilbert had no discretion given him to

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determine when or how a sale should take place. The agreement was unconditional, that if the contingency should occur, which did occur, the contract should be delivered to the sheriff in order that it might sell.

Sixthly. It is said that the complainants might have filed a bill in chancery, and thus effected a sale. We do not see how this excuses Gilbert. He had no right to require them to do so. If he doubted the power of the sheriff to sell, or thought that the property would be sacrificed, unless sold under a decree of court, why did he not file a bill himself? He was trustee, and also a *cestui que trust*. If he wished to make the property available for the purpose for which it was assigned, and especially if he considered it necessary for his own indemnity, as he pretended, why did he not take the steps which he now says were necessary; instead of this, he would do nothing but hold on to the contract; he neither suffered the property to be sold by the sheriff, nor effected a sale in any other way. He so managed, that out of a valuable estate that would, probably, almost or quite have saved Lewis' indorsers harmless, and which was assigned to him for that purpose, not one cent was realized by them.

Lastly. It is claimed that Gilbert had a right to retain the contract for his own security; and, strange as it may seem, after the numerous excuses we have been considering, this is the only reason he gave, at the time, for refusing to deliver it up. He did not, indeed, expressly assert a *right*, but said "that he must retain it for his own security." This was a plain and palpable violation of his duty, he being bound to deliver it up on the happening of the contingency before mentioned. Indeed, it is impossible for us, upon the testimony, to reconcile his conduct with a disposition to act fairly. He not only prevented a sale at the time of which I have been speaking, which was in the early part of 1836, but more than 153] two years afterward, in the spring of 1838, when *Calvin G. Sutliff's farm was under execution, and after he had had the most ample time to ascertain his duty, if he were in doubt about it, he again refused to surrender the contract. And, finally, King, the vendor, was allowed to repossess himself of the property, but by what arrangement, the master was unable to report, as it was not explained; and the whole security became lost to the indorsers. Under all these circumstances, we can not say that the court erred

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in holding Gilbert accountable, as they did, and we do not think they estimated the value of Lewis' interest in the property too high.

But if the charge for the Lowe property were rejected, still the decree could not be reversed unless, upon the whole case, the sum decreed was too great. That, even rejecting that item, it was not too great, is, we think, manifest. Gilbert, in September, 1832, purchased a mortgage, called the Cone mortgage, executed by one Lambert W. Lewis, the debt secured by which, had been reduced by payments until not over \$800 were due, including the cost of a bill to foreclose. We are satisfied he paid not over that sum for it; yet, in the January following, he made a sale, or pretended sale, of the mortgage, to Garry Lewis, for \$2,884.14, and took his notes for that amount. Two of these notes, amounting to \$2,000, exclusive of interest, formed part of the consideration of the purchase of one of the farms which Garry Lewis, about the time of his failure, at the beginning of 1836, conveyed to Gilbert; and they are so credited to Gilbert in the master's report. Now, we are satisfied that this transaction, so far as these notes are concerned, was a sham. We do not believe that Lewis ever, in good faith, agreed to pay \$2,884.14 for a mortgage, upon which he knew that but about \$800 were due. The testimony shows that for some years before his failure, he was largely indebted, that his transactions with Gilbert were very numerous, and that, in the end, Gilbert became possessed of nearly the whole of his real and personal estate. That he was disposed to cover up his property we are well satisfied, and that he looked to Gilbert to aid him *is more [154] than probable. At all events, as Gilbert was allowed to retain the farm, he might well have been charged with said \$2,000, and the interest thereon, forming a pretended, but not real, payment toward its purchase.

Again, the assignment of the goods to Gilbert was to indemnify him as surety for Lewis, to Henry Wick, John W. Seeley, Francis Freeman, and George Parsons, respectively, and also a surety upon the bank debt. By a provision of the assignment, Gilbert was authorized to sell the goods, and apply the proceeds, first, to satisfy Freeman; next, Wick; then the bank. But the master, and the court below apparently overlooked this, and allowed the bank debt to be postponed, not to Freeman and Wick only, but also to Seeley and Parsons. The consequence was, that \$1,569.95 was credited to Gilbert, as having been paid to Seeley and Parsons, which

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should have been paid on the bank debt. This sum, and the \$2,000 and interest before mentioned, approximate the amount, \$4,000, charged for the Lowe property. Other items might be shown that would more than make up the difference. Suffice it to say, that we are fully satisfied, after a careful examination of the testimony, that the decree was not for too large a sum, even were the charge for the Lowe property rejected. In any aspect of the case, the bill must be dismissed.

RANNEY, J., having been of counsel, did not participate in the decision of this cause.

ELIZABETH MOORE v. LESSEE OF RACHEL MOORE ET AL.

An acknowledgment of a deed taken by a mayor without the limits of his city, is valid.

ERROR to the court of common pleas of Clark county, reserved in the district court.

The action below was ejectment. The plaintiff in that action having made a *prima facie* case, the defendant offered *in evidence a deed from Rachel Moore, one of the lessors of the plaintiff, dated June 9, 1852. It was admitted that the acknowledgment of the deed was taken by the mayor of Springfield, without the limits of the city, and of the township, in which the city is situate, and that the lands were all without the limits of said city and township; but the competency of the facts so admitted was denied, the deed purporting to be acknowledged within the city limits; and the admission was made subject to the question of its competency. The evidence was received by the court below, and the motion of plaintiff to reject the deed was sustained, to which the defendant excepted.

This writ is sued out to reverse the judgment for the alleged error of the court in rejecting the deed.

Shellabarger & Hunt, for plaintiff in error.

S. & R. Mason, and *Wm. White*, for defendant.

McKesson v. Stanberry.

CORWIN, C. J. The act done by a mayor or justice of the peace in taking the acknowledgment of a deed is the exercise of a power in the nature of that conferred upon a commissioner of deeds. In the act "to provide for the proof, acknowledgment, and recording of deeds and other instruments of writing" (Swan, old ed. 265), no territorial limit is fixed to the power of the officers invested with the power of taking acknowledgments. As to justices of the peace, however, another statute provides that the power "shall be co-extensive with the county in which they may have been elected." Ib. 506. If, as held in the case of Crumbaugh v. Kugler, 2 Ohio St., the taking of an acknowledgment without his county is a valid act, *a fortiori*, such an act must be valid when done by a mayor without the limits of his city; no territorial limitation whatever being expressed in the statute.

For the error of the court in rejecting the deed offered in evidence, the judgment must be reversed.

*ISAAC MCKESSON, ADMINISTRATOR OF WILLIAM MCKESSON, [156
v. JOSEPH STANBERRY.

A *bona fide* holder of negotiable paper, received by indorsement or other proper mode of transfer, before due, for a valuable consideration, is protected against the defense which the maker might have against the original payee; yet, in this case, as in every other, it is the duty of every person to use ordinary care and prudence in his transactions to prevent their operating to the prejudice of others.

Whatever may be the rule, where no fraud is shown to have been perpetrated on the maker by the original holder, in transferring the note, in a case which shows that the transfer, on the part of the first holder, was a positive fraud, it lies on the party claiming under such transaction to show that he acted honestly, without knowledge of the fraud.

ERROR to the district court of Erie county.

The facts and questions appear in the opinion of the court.

Goodwin & Wildman, for plaintiff.

J. Mackey, for defendant.

McKesson v. Stanberry.

CALDWELL, J. This cause comes into this court on a writ of error to the district court of Erie county. It is alleged that the district court erred in affirming a judgment of the court of common pleas rendered in favor of the defendant. The proceeding in the common pleas was an action of assumpsit on a promissory note bought by the administrator of Wm. McKesson, who was the holder thereof at the time of his death. The note was for \$80, given by Joseph Stanberry to C. W. Creaty, by him transferred to James Flannagan, and by Flannagan indorsed to Wm. McKesson, plaintiff's intestate.

In the court of common pleas the jury found a special verdict as follows: "From the testimony they find: 1. That the defendant did make and deliver his promissory note for a brick-machine to C. W. Creaty, and not to Robert Creaty, as described in the first count in plaintiff's declaration; that said note was dated between, or on, the fourth or tenth day of May, 1849, due four months from date, 157] for the *amount of \$80, payable to C. W. Creaty or bearer; that said note was negotiable by being payable to bearer, and was not on interest; and that the amount due on the first day of the present term is \$90.26; 2. That McKesson, the intestate, received the note after it became due, and it obtained by indorsement from one James Flannagan, and that McKesson gave a valuable consideration therefor; 3. That no evidence appears that Flannagan received the note before due, or that he gave a valuable consideration therefor; 4. That the note was indorsed by Flannagan and no one else, and that Flannagan guaranteed the collection of said note; 5. That the consideration received by Stanberry was a brick-machine, which was worthless to him; the said consideration so received was returned to the payee, and the note was agreed to be delivered up to Stanberry." To this finding of facts is appended the usual reference to the court with the alternative finding. The court of common pleas on this special finding gave judgment for the defendant.

From the special verdict it will be seen that the note in the hands of Creaty, the original payee, was of no validity, and that his transfer of it was a fraud. If, however, Flannagan received it in good faith before due, for a valuable consideration, the note would be good in his hands, and the maker liable to him for the amount. So, too, in the hands of McKesson, his assignee, although he received the note after it fell due, having purchased the property in the note from Flannagan, he thereby became invested with

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all the rights of Flannagan, and whether there was any right to recover on the note depended on whether Flannagan was a *bona fide* holder without notice.

On this point there was no evidence. The whole question presented, then, is on whom does the burden of proof rest; on the plaintiff, claiming the rights of a *bona fide* holder without notice, to prove that he is such? or on the defendant, the maker of the note, to prove that the plaintiff is not entitled to those rights?

*Now, although it is a principle of law that a *bona fide* [158 holder of negotiable paper, received before due for a valuable consideration, shall be protected against the defense which the maker might have against the original payee, yet in this case, as in every other, it is the duty of every person to use ordinary care and prudence in his transactions, to prevent their operating to the prejudice of the rights of others. Whatever the rule may be in a case where no fraud is shown to have been perpetrated by the original holder in transferring the note, in a case like this, where it is shown that the transaction, on the part of the original holder, was a positive fraud, we think it lies on the party claiming under such transaction, to show that he acted honestly, without a knowledge of the fraud. Presumptions of law are the presumptions of common sense, derived from human experience, and I think the experience of most men will concur in the statement that the chances are against an honest, careful man being made an active party in a fraudulent act. It not being likely that such fact should exist, when it does occur, it lies on the party claiming it to prove it. This view of the case, we think, is fully sustained by the current of authority. In the case of *Monroe v. Cooper et al.*, 5 Pick. 412, the court say: "The fact that the note was fraudulent in its inception, or that it was fraudulently put into circulation, being proved, the onus of proving that he came into the possession of the note fairly, and without any knowledge of the fraud, lies on the holder." See also *Woodhull v. Holmes*, 10 Johns. 230; 2 Cowen & Hill's Notes, Philips Ev. 477. The plaintiff having failed to prove a fact incumbent on him to establish to entitle him to recover, we think the court of common pleas decided correctly in giving judgment for the defendant.

The judgment of the district court, affirming that judgment, will therefore be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO,
AT
DECEMBER TERM, 1854.

PRESENT:
HON. ALLEN G. THURMAN, CHIEF JUSTICE.
HON. RUFUS P. RANNEY,
HON. THOMAS W. BARTLEY,
HON. ROBERT B. WARDEN,
HON. WILLIAM KENNON, } **JUDGES.**

MORTIMER FARIS v. THE STATE OF OHIO.

Whatever may formerly and elsewhere have been the the necessity for resistance to an officer, in certain cases, there is, at this day, and in this country, no want of the peaceful protection of property against a seizure, made in good faith by one clothed with public power, and subject to public responsibility. Nor is there any want of quiet, safe, and sure means to recover it when so taken.

Whenever the question of property is so far doubtful, that the creditor and officer may be supposed to act, and do in truth act, without wantonness, carelessness, or oppression, but in good faith, and on reasonable grounds for believing the property to be that of the debtor, the owner has no right to resist the execution or attachment by a breach of the peace.

The conversion, by a justice of the peace, of the first execution on a judgment before him, into an alias writ, by altering its date is irregular, but can not

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destroy the protection due to the constable to whom it is delivered. The writ is not void.

Whether an indictment for resisting an officer, must not set forth in words or substance, the process on which the officer acted, describe the manner of executing the writ, and of the resistance, and aver the knowledge of the defendant that the officer was such—*quære*.

ERROR to the court of common pleas of Morrow county
The facts are fully stated in the opinion of the court.

- **Finch & Olds*, for plaintiff in error.
Pugh, attorney-general, for the state.

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WARDEN, J. At the July term, 1851, the plaintiff in error was tried on an indictment containing three counts, two for resisting and abusing an officer in the execution of his duty, and one for simple assault and battery on the same person.

Evidence was offered tending to prove the following state of facts :

The plaintiff in error put into the hands of Bacon, a constable, an execution for \$10.47, against one Clark as principal, and plaintiff in error as surety, directing him to make the amount out of Clark's property. No property of Clark was found within the township; but he promised to bring out of another township, and subject to levy, a two-horse wagon. Though he did not keep this promise, he paid the constable ten dollars and twenty cents, and the latter retained the execution for some time, on his assurance that he would pay the balance. The officer says that before the time of the execution expired he returned it to the justice, with his return, dated November 11, 1850, showing how much money he had made. The justice altered the date of the writ from October to January, and re-issued it. The bill of exceptions does not profess to contain all the testimony; but what appears indicates that the writ must have been retained until after the return day, notwithstanding the officer's declaration to the contrary. Be that, however, as it may, it can not affect the questions now before the court; no motion for a new trial having been made, and all the evidence not being shown by the record.

On the 24th of January, 1851, in the absence of the plaintiff in error, the constable levied on a load of corn, believing, as he swears, that it was Clark's property, and having been informed that it was such by another witness. That other witness testifies that

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he met plaintiff in error before the levy, and the latter told him that the corn was Clark's, and that he (Faris) was hauling it to market for Clark. On the other hand, Clark testifies that before 161] the levy, he had sold the *corn to Faris, on account of a previous indebtedness of about six dollars. And when, after the levy had been made, the constable met Faris, the latter insisted that the corn was *his*, not Clark's, of whom, he said, he had bought it. The constable, having informed Faris of the fact that he had levied on the corn as Clark's, left the corn to get another team to haul it away. On his return, seeing the defendant driving the load away, the constable followed him, claimed the corn under the levy, and reiterated the claim, in answer to the declaration of Faris that the corn was his, and that he would not give it up. Faris refusing to stop, as ordered, the constable seized his horses' heads; Faris tried to drive on, and, not succeeding, went forward on the tongue of his wagon and struck witness with his whip. The constable making a second attempt to stop the wagon, Faris got off his wagon, struck the constable with his whip and fist, and kicked him, and finally drove off the corn.

On this and other testimony (some of which tended to contradict it, and some to show that Clark had other property subject to seizure, though not within the officer's knowledge), the counsel for Faris asked the court to charge the jury as follows:

"1. That if the constable went beyond his legal duties, he was a trespasser; and that when a constable was a wrong-doer, he had no further rights than any other individual.

"2. That if the principal in the execution mentioned had, at the time said execution was first placed in the hands of the said constable by the defendant, sufficient property that said constable could have got to satisfy the same, or if said constable had made any agreement with said Clark to wait on him for the money, and did not make a levy, that the constable was liable for the debt, and had no right to have a second execution for his own benefit.

"3. That under the indictment in this case, and the return of said constable on said writ so used as evidence, the plaintiff had no right to any benefit from the fact that said execution was against the defendant as bail.

162] *"4. That the constable, before he could legally levy upon the property, should know that it was the property of the judgment debtor.

"5. That the writ upon which said constable acted, and which is hereto attached as a part of this bill of exceptions, was not a sufficient writ to authorize said constable to levy upon property of [the] judgment debtor on the 24th day of January, A. D. 1851."

"Which instructions the court refused to give (says the record) in the form requested, but did direct the jury, in substance, as in the first request made, that a constable was bound to act within the limits of his authority; and that, in a proper state of fact, he was liable in law for exceeding his authority."

The court further charged the jury as follows:

"That if the corn was in fact the property of Clark, and the constable knew or had good reason to believe that it was Clark's corn, and in the honest discharge of his official duty had made the levy, believing it to be the property of Clark, the defendant would not, under such a state of fact, be justifiable in resisting the constable, by force or assault, thereby to prevent him from executing his duty, even though, upon investigation afterward, it should be found to be the property of defendant, and not Clark's.

"That, although it would have been better for the justice of the peace to have written and delivered a new writ to the constable, yet the re-delivery was a sufficient issuing of the writ to protect the constable on the said 24th day of January, 1851, in levying on the property of said Clark, and against the assault of said defendant after he had made the levy.

"That if said Clark, at the time said constable first had the said execution in his hands, had property sufficient to make the amount of said execution, that was in the power and jurisdiction of the constable; and if, at the request of Clark, the constable waited on him, or on his promise to raise and pay the money due on the execution, and did not make a levy, whereby the amount [163 was not made on the first execution until after return, through the constable's neglect, [though the constable might thus become] "liable to the plaintiff in execution for failing to execute the writ, the defendant thereby acquired no justification in law in resisting him by an assault, after he had levied on property under the second execution to make the money still unpaid."

The first instruction asked, must be considered as having been substantially given.

The second was rightly refused. Though a constable or sheriff may render himself liable to the plaintiff in execution by failing to

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make a levy or return within the time limited by law, the principal defendant in execution can not object to the levying of a second execution, nor certainly can the surety object, when it is not sought to levy the execution on any property other than that of the principal. The officer would have a right to the execution even after amercement; *a fortiori* may he execute the writ against the principal debtor in a case like the present, where it does not appear that the plaintiff in execution made any complaint whatever.

The third instruction prayed was immaterial. No attempt was made to levy on the property as that of the bail.

The fourth could not have been properly given. It is unnecessary to the validity of a levy that the officer levying on the property of a judgment-debtor should know it to be his; it is enough that it is in fact the debtor's property. But the court below did not confine itself to refusing this charge, as asked. The jury was instructed, in substance, that if the constable had good reason to believe that the property in question was that of Clark, and levied on it, in the honest discharge of his duty, and under a reasonable belief that it was Clark's, Faris was not justifiable in resisting him by force or assault, although upon investigation afterward, the property should be found to belong not to Clark, but to Faris.

164] *The insignificance of the interests involved in the controversy, out of which grows the question here presented, stands in striking contrast to the importance of that question itself, considered in its relation to public policy. The obstruction of an officer in the execution of process, is a grave offense against public justice; but it is likewise matter of just concern to protect the citizen from unjustifiable seizures of person or property. To officers charged with the duty of making the amount of judgments by seizures of property, a right decision of such a question as that raised by the instruction given to the jury in this case, is matter of such moment, that no court can approach it without a sense of its difficult and delicate nature.

Though few authorities have been cited, and few analogous cases can be found, this question is not wholly a new one.

Two decisions in the State of Vermont, are in favor of the ruling of the court below, while one in Massachusetts and another in Illinois, may be considered as opposed to it. No precedent, which this court is absolutely bound to follow, is within our knowledge.

In one of the Vermont cases (*State v. Downer*, 8 Vt. 824), it was

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held, that "if an officer attach personal property in good faith, which in fact did not belong to the person on whose debt he made the attachment, still it is not lawful for the owner of the property even to resist the attachment, but he must resort to the action at law." And the second case in the Vermont Reports (*State v. Miller*, 12 Vt. 437), while it makes a nice, but true and necessary distinction between the facts which would make an entire stranger guilty of impeding and hindering the officer in making a seizure of property, and those which will render the owner guilty, fully sustains the doctrine of the former case.

On the other hand, an opposite doctrine seems to be contained in *Commonwealth v. Kennard*, 8 Pick. 135, Parker, C. J., delivering the opinion. That case is, indeed, clearly distinguishable from the present, so far as the degree of violence *used by the owner [165] in defending his property is concerned; and if this case stood upon the count for assault and battery alone, I should regard it as quite reconcilable with the conclusion to which we have been brought in our examination of this case. But, fairly considered, the opinion of C. J. Parker is apparently opposed to that of Justice Redfield, in the case first cited. It is said by C. J. Parker: "We have had no authorities cited on the part of the commonwealth, which have any tendency to show that the owner and possessor of goods may not defend them against an officer who comes to seize them as another person's. That a man may defend his person, his lands, or goods, against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable. If the officer believes the possession is only colorable, and the claim of the property fraudulent, if backed by the creditor's orders, or secured by bond of indemnity, he will take care to be so attended as to be protected against insult in the execution of his precept." Here seems to be a full recognition of the owner's right to resist the attachment of his goods as the property of another; and while the caution of the court that "this decision will form no precedent for cases which may be differently circumstanced," and its careful limitation of the lawful resistance to such as shall fall "short of injurious violence to the officer," ought not to be overlooked, it must still be allowed that this decision is not quite reconcilable with that in Vermont.

A case decided by the Supreme Court of Illinois (*Wentworth v. The People*, 4 Scam. 550), may also appear in conflict with the

opinion of the Vermont court ; but the conflict is not real. In the case last cited, it does not appear that the officer had any belief, or any reason to believe, that the goods were not those of the person who had them in possession.

With the greatest respect for the high character and abilities of Chief Justice Parker, we shall find some good reasons for preferring the doctrine of the Vermont court. If, to mention one of several objections to the reasoning of Chief Justice Parker, the owner has the right to defend his goods against an attaching officer who attempts to take them as another's, it does not seem very clear that the officer, however backed or provided with indemnity, can be justified in securing such attendance as to be protected from insult in the execution of his precept ; nor can I understand, indeed, how, consistently with the doctrine of Kennard's case, it can be said that, in the given instance, there can be any precept whatever to execute, to say nothing of the obvious right of the owner himself to have an attendance in *defending* his possession equal to the force brought against it. But is it not singular, that in a case upholding the right of the owner to resist the officer, while unattended, the suggestion should be made that the officer may, by an appeal to the power of the county, overawe the owner so as to prevent him from asserting the very right recognized ? And yet such is our understanding of the whole effect of the opinion in Kennard's case.

When the nature of the question, and the history of the rulings on the subject of defending person and property, which have illustrated the advancement of the common law from rude and barbarous to refined and enlightened civilization, are clearly taken into view, we shall find the reasoning of Justice Redfield altogether safe, and exactly in harmony with the system of government and society to which it is applied. "It is well settled," says the justice, "that one may defend the possession of his property against a stranger with such force as may be necessary. But this right can not be extended to the case of an officer, whose duty it is to attach property whenever he is requested so to do. He may, or may not, require indemnity for the act. But it would be too much to say that he must decide all cases of doubtful property at his own hazard, or that if he attempted to make an attachment when the property was not, in fact, in the debtor, he might, by the owner of the property, be resisted to any extremity. The rule would be the

same when he called out the *posse comitatus*, and the question, whether the *officers of justice, or the rioters, shall be held [167 liable to indictment, must depend upon the decision of some abstract question of property, which the sagacity of no man was sufficient to foresee. And if the owner of property may resist an officer in its defense, so may one who believes himself the owner ; for it will not do to predicate crime upon so subtle a distinction as an abstract right of property. It must be something more tangible."

Whatever may have been the necessity for resistance to an officer in other lands and times, there is at this day, and in this country, no want of the peaceful protection of property against a seizure made in good faith by one clothed with public power, and subject to public responsibility. Nor is there any want of quiet, safe, and sure means, to recover it when so taken. While the rule of *stare decisis* is the great safety of rights subject to judicial decision, maxims, and regulations fitted to a former state of society and government are not to be preserved and forced into an unnatural application, when and where the very conditions necessary to them when established, have long since passed away. If, therefore, it were clear that the early decisions, or even the present adjudications of English courts are opposed to this Vermont decision—and such is far from the truth—we should still regard the doctrine of Downer's case as the only one which we ought to adopt, as applicable to our government and people. It must be familiar to all, that, while the tendency of the best and highest American decisions, as well as the very genius of our government, are favorable to an increased regard for the sanctity of the *person*, by the same law, many measures of defense as to *property* have become obsolete and shocking to the enlightened humanity of the day. If the rule that one must retreat to the wall before killing his assailant has passed away, so has the day of man-traps and spring-guns. If an officer may be resisted to the death to prevent an unauthorized and disgraceful seizure of the person—and so some courts have been disposed to hold—*the mere taking of a few bushels of corn, by mistake, is not [168 to subject a constable to a horsewhipping.

Surely, a seizure of property by an officer, in good faith, and on good ground for that faith, apparent to the owner of the property as such, although the property be erroneously supposed to belong to another, will not justify the owner in a resort to personal violence. An officer is, so far as his motives or his right to protec-

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tion are concerned, none the less in the execution of his duty when he seizes property in good faith, and with reason for his belief, as belonging to A, because it happens, in fact, to belong to B. He is not infallible, nor does the law expect him to be so; it only demands that he shall be honest, and not wantonly trample on the rights of others. It may be allowed that, in the seizure, he is a trespasser, and liable in damages as such; but if he is following his convictions of duty, he must be regarded as in the execution of his office, so far as to be entitled to protection against the violence of the owner of property which he subjects to seizure. The owner may, if he can, peaceably prevent the taking of his property; and such peaceable prevention will not amount to unlawful resistance or abuse; but he can not be allowed to forget the rights and responsibilities of the officer, so far as to "abuse" his person. It ought to be remarked that the case in *Pickering*—decided in 1829—passed in review in *Downer's* case, which was decided in 1836.

We hold, then, "the better and safer, and only practicable rule to be, that whenever the question of property is so far doubtful that the creditor and officer may be supposed to act," and do in truth act, in good faith, and on reasonable grounds for believing the property to be that of the debtor, the owner has no right to resist the execution or attachment by a breach of the peace.

The fifth instruction asked, supposes the execution under which the levy was made to have been a nullity. We can not so regard it. It was irregular, but not void. The destruction of the first execution issued on a judgment, *would not affect the validity of a second execution; nor can its conversion into an alias writ, by a mere change of date (however irregular such a proceeding on the part of the magistrate was), affect the protection due to the constable to whom it was delivered.

We find no error in the refusal to give instructions, or in the charge as made, which would warrant a reversal of this judgment.

The motion in arrest of judgment remains to be considered.

It is said the first two counts of the indictment are bad. They are said to be double, and to be uncertain.

They are as follows:

I. "That one Mortimer Faris, late of the county of Morrow aforesaid, heretofore, to wit, on the 24th day of January, in the year of our Lord 1851, with force and arms, at the township of Cardington, in the county of Morrow aforesaid, in and upon one

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Roland C. Bacon, he, the said Roland C. Bacon, then and there being a constable within and for the township of Cardington aforesaid, in the county of Morrow aforesaid, legally authorized to act as such, and then and there having in his possession, as constable aforesaid, a certain writ, commonly called a fieri facias, which writ was duly issued by John Andrews, then and there being an acting justice of the peace within and for the township of Cardington, in the said county of Morrow, and then and there being duly authorized to act as such justice of the peace, by which writ the said Roland C. Bacon was rightfully and legally commanded to levy upon the goods and chattels of one Watson Clark, as principal debtor, and for want thereof, upon the goods and chattels of one Mortimer Faris, as bail, to satisfy a certain judgment rendered by said John Andrews, as justice of the peace as aforesaid, against the said Watson Clark, as principal debtor, and said Mortimer Faris as bail, as therein said writ specified; which writ is in the words and figures following, to wit:

*"THE STATE OF OHIO, MORROW COUNTY, ss.

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"To any Constable of Cardington Township, greeting:

"Whereas, E. McGregor, administrator of C. C. Sloan's estate, obtained judgment against Watson Clark as principal, and Mortimer Faris as bail, before me, John Andrews, a justice of the peace in and for the township aforesaid, for the sum of \$10.47, and costs assessed at 50 cents, on the 9th day of October, 1850. You are therefore commanded, that of the goods and chattels of the said Watson Clark, principal debtor, you cause to be made the debt and costs aforesaid, with interest and costs that may accrue, and for want of goods and chattels of said principal, you make the same of the bail; and of this writ make legal service and due return.

"Given under my hand and seal, this 9th day of January.

"JOHN ANDREWS, J. P. [SEAL.]"

'And the said Roland C. Bacon, being then and there in the due execution of the office of constable as aforesaid, in and about the execution of said writ upon the goods and chattels of the said Watson Clark, did then and there unlawfully assault, abuse, and ill-treat, and did then and there resist and abuse the said Roland C. Bacon in the execution of his office of constable as aforesaid, to wit, in the execution of the writ aforesaid, and other wrongs to the said Roland C. Bacon, then and there did to the great damage of the said Roland C. Bacon, contrary," etc.

II. "That one Mortimer Faris, late of the county of Morrow aforesaid, heretofore, to wit, on the 24th day of January, in the year of our Lord, 1851, with force and arms, at the township of Cardington aforesaid, in the county of Morrow aforesaid, in and upon the person of one Robert C. Bacon, then and there being an officer, to wit, a constable within and for the township of Cardington aforesaid, in the county of Morrow aforesaid, and legally authorized to act as such, then and there being in the due execution of the office of constable, as aforesaid, by executing a certain writ of fieri facias upon the goods and chattels of one Watson Clark, did unlawfully assault, resist, and abuse him, the said Robert C. Bacon, in the execution of his office of constable, as aforesaid, then and there did unlawfully strike, beat, wound, resist, abuse, and ill-treat, 171] and other wrongs to the said *Robert C. Bacon, then and there did, to the great damage of the said Robert C. Bacon, against the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

These counts are certainly not bad for duplicity; their defects are of an opposite character; they probably do not contain enough to satisfy the law of criminal pleading. In *Lamberton v. The State* 11 Ohio, 288, it was held that an indictment for resisting an officer in the execution of his duty, must set forth all the facts necessary to constitute the offense. Among other things, the court requires the writ to be set forth, if not in *haec verba*, at least in substance. And in the case already cited from 8 Vermont, it is said, that "the process should have been so far set forth, that the court could see that it was legal, and that the officer had authority to serve it. All the authorities, too, concur in requiring that the bill should contain an allegation of the particular mode of resisting the officer. And no doubt the mode in which the process was attempted to be executed should be specifically set forth. And it should be alleged that the respondents knew of the character in which the officer claimed to act." On the other hand, the English indictments, and the authorities and precedents in the United States federal courts, are against this strictness.

While the rule laid down in *Lamberton's case*, 11 Ohio, 282, would seem to support the ruling in Vermont, we do not feel obliged, in this case, to fix the absolutely necessary requisites of an indictment for resisting an officer. There was a general verdict of guilty; and the third count of the indictment was for a simple

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assault and battery. The sentence was for a fine such as the court would be authorized to inflict for the offense defined in the third count. Even, therefore, if we should find the first and second counts defective in substance, the good count would support the verdict and judgment.

The judgment must be affirmed.

*JOHN G. KERWHACKER v. THE CLEVELAND, COLUMBUS AND [172
CINCINNATI RAILROAD COMPANY.

1. That there is no law in Ohio prohibiting the owners of domestic animals, consisting of cattle, horses, hogs, etc., from suffering them to run at large upon the range of uninclosed lands, except when unruly and dangerous; and that the rule of the common law of England, requiring the owners of such animals to keep them on his own land, or within inclosures, has never been in force in Ohio, being inapplicable to the circumstances, condition, and usages of the people, and also inconsistent with the legislation of the state.
2. The owner of such animals, in allowing them to be at large on the range of uninclosed lands, is not chargeable with *an unlawful act*, or an omission of *ordinary care* in keeping his stock, doing nothing more than that which has been customary, and, by common consent, done by the people generally, since the first settlement of the state, subject to the qualification, however, that animals which are unruly or dangerous are required to be restrained.
3. There is no law in this state requiring any person to fence or inclose his own lands; yet the person who leaves his grounds uninclosed, takes the risk of occasional intrusions thereon, by the animals of others running at large. And the owner of such animals, in allowing them to be at large, takes the risk of their loss, or of injury to them, by unavoidable accident, from any danger into which they may happen to wander.
4. The right of a railroad company to the free, exclusive, and unmolested use of its railroad track is nothing more than the right of every land proprietor in the actual use and occupancy of his lands, and does not exempt the company from the duty enjoined by law upon every person, so to use his own property as not to do any unnecessary injury to another.
5. There is no law in Ohio requiring railroad companies to fence their roads, but when they leave their roads open and uninclosed by sufficient fences and cattle-guards, they take the risk of intrusions upon their roads by animals running at large, as do other proprietors who leave their land uninclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable acci-

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dent; and the company, in leaving its road unprotected by an inclosure, runs the risk of animals at large getting upon the road, without any remedy against the owner of the animals.

6. The liability to make reparation for an injury by negligence is founded upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another.
7. The mere fact that one person is in the wrong does not necessarily discharge another from the due observance of proper care toward him, or the duty of so exercising his own rights as not to do him any unnecessary injury.
8. The doctrine that, in case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject to [73] *the following material qualifications, as appears from a review of the decisions, both in England and in this country, on this subject, to wit:

First. The injured party, although in the fault to some extent, at the time, may, notwithstanding this, be entitled to reparation in damages for an injury which he has used ordinary care to avoid.

Second. When the negligence of the defendant, in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time of the injury, the action is maintainable.

Third. Where a party has in his custody or control dangerous instruments or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress.

Fourth. And when the plaintiff, in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant, he is entitled to reparation on the ground that, although, in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing *ordinary care*, or, in other words, voluntarily incur the risk of injury by the defendant's *negligence*.
9. Having left its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals accidentally getting upon the railway track, it is the duty of the railroad company, acting through its agents, to use at least ordinary and reasonable care and diligence to avoid unnecessary injury to the animals, when found in the way of a train on the road.
10. The first and paramount object of the attention of the agents of the company, is due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care; and so far as consistent with this paramount duty, they are bound to the exercise of what, in that peculiar business, would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road; and for any injury to animals arising from a neglect of such care, the company is liable in damages to the owner.

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WRIT of error to the court of common pleas of Morrow county.

In the court below, the plaintiff in error declared against the defendant, in trespass on the case, for the alleged negligence and misconduct of the defendant's agents in conducting and running a locomotive and cars on the defendant's *railway track, where- [174] by six hogs, the property of the plaintiff, were killed. The defendant plead the general issue.

On the trial of the cause before a jury, it appeared that the defendant's railroad, extending from Columbus to Cleveland, passed through the farm of the plaintiff on which he resided in the county of Morrow; that on the 17th of April, 1851, a train of cars, under the management of the defendant's agents, in passing upon said railroad through the plaintiff's farm, ran upon the plaintiff's hogs, which had wandered off upon the railway track, and killed them; and evidence was offered on the part of the plaintiff, tending to prove, that at the time the hogs were killed, the train was passing at the usual and ordinary speed, and that from the situation of the railroad at that locality, and the relative situation and locality of the hogs and the train of cars on the railroad at the time of the occurrence, the defendant's agents in control of the train, could easily and readily have so checked the speed of the cars as to have permitted the plaintiff's hogs to have escaped from the railroad track without injury; but that the agents of the defendant did not check the speed of the train, but continued to run the same with unabated speed, by reason whereof the hogs were unable to escape, and were killed. And it appears also, that evidence was offered on the part of the defendant, tending to prove that at the time of the occurrence, "the agents of the defendant did check the speed of the train—that the usual signal was given to check up, before the cars ran over the hogs—that the train was at the time running at its usual and ordinary speed."

The testimony having been closed, the plaintiff's counsel asked the court to charge the jury, that if they were satisfied from the evidence, that the defendant's agents could, by the exercise of ordinary care and caution, have so checked the speed of said train of cars, as to have permitted the plaintiff's hogs to have escaped without injury, but that the defendant's agents did not at all check the speed of the train, or attempt so to do, but continued to run the same at the usual *and ordinary speed, by means whereof the [175] plaintiff's hogs were killed, the plaintiff would be entitled to a ver-

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dict for the value of the hogs so killed. The court, however, refused to give this in charge to the jury, but instructed the jury as follows:

"1. That the defendant had a right to have the track of its railroad free from obstructions, so that its trains might run thereon with safety, subject to be crossed only on public highways, and regular private crossings, and that, therefore,

"2. If the jury found from the evidence that said hogs of the plaintiff were killed while on the track of said railroad, and not while crossing said railroad at such public or private crossing; that said hogs were unlawfully upon said track; that said defendant was not bound to check the ordinary and usual speed of said cars; and that if said hogs were killed by defendant's train of cars, while in the ordinary way passing along said track, said plaintiff had suffered damage, but not injury from the act of the defendant, and that the defendant was not liable therefor."

To the charge thus given by the court below to the jury, and the refusal to charge as requested, the plaintiff excepted, and took his bill of exceptions, setting out the facts as above stated.

Under the instructions of the court below the jury returned a verdict for the defendant, on which judgment was rendered, to reverse which, this writ of error is prosecuted.

S. J. Kirkwood & B. Burns, for plaintiff in error.

Finch & Olds, and *H. B. Carrington*, for defendant.

BARTLEY, J. A maxim of the law, tested by the wisdom of centuries, exacts of every person, in the enjoyment of his property, the duty of so using his own as not to injure the property of his neighbor. It is in accordance with this principle, that it has been held, that though a person do a lawful thing, yet, if any damage [176] thereby befalls another, which he *could have avoided by reasonable and proper care, he shall make reparation. Hence the general rule, that in all cases where damage accrues to another, by the negligence or improper conduct of a person in the exercise of his peculiar trade or business, an action is maintainable. *Shiells v. Blackburne*, 1 Hen. Blacks. 158; *Moore v. Morgue*, Cowp. 480; *Buller's N. P.* 73; *Broom's Legal Maxims*, 248.

How far this doctrine is applicable to railroad companies in the exercise of their peculiar business, is the question presented in the
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case before us. The court below refused to charge the jury, on request, that, if they found from the evidence, that the defendant's agents could, in the use of ordinary care, have easily and safely avoided the destruction of plaintiff's property, by checking the speed of the train, the defendant would be liable; but on the contrary, instructed the jury, that as the hogs were improperly on the railroad, the defendant's agents were not bound to check the ordinary and usual speed of the cars, or use any means or caution, to save the plaintiff's property. The position taken by the court below, assuming the animals to have been unlawfully on the railroad, would justify not only a wanton disregard of the plaintiff's property, but even an intentional destruction of it by defendant's agents, providing it occur while running the train over the railroad in the ordinary way, and at the usual speed.

Railroad companies have become important and useful public agents, affording vast facilities for trade and travel, and producing extensive results upon the social condition, as well as the business of the country. But while it is important that they be fully protected in the appropriate and legitimate exercise of their powers, it is *just* that private individuals be secured from injury, or invasion of their rights, by the mode or manner in which railroad companies exercise their peculiar functions. The obligation to make reparation for damage done to another by a person in the improper manner in which he exercises his own appropriate employment, often requires great nicety of discrimination; and the application *of this injunction to railroad companies in their peculiar [177 business, so widely differing from the ordinary pursuits of persons, must frequently become a matter of no inconsiderable difficulty.

It is claimed on the part of the defense in this case :

1. That it is the duty of the owner of domestic animals to keep them on his own lands or within his own inclosures; and that if they wander from his own lands and get upon the uninclosed lands of his neighbors, they will be unlawfully there, and the owner guilty of a trespass.

2. That the plaintiff being in fault, and guilty of an unlawful act in allowing his hogs to escape from his own lands and get upon the railroad, he can not maintain an action for the value of the animals killed by the defendant while in the prosecution of its lawful business, even although the agents of the company might have

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readily and safely avoided injury to the animals by the exercise of ordinary care and prudence in the management of the train of cars.

The doctrine that the owner of cattle, hogs, horses, etc., is bound to keep them on his own lands, or within an inclosure, and that he becomes a wrong-doer if any of them escape or stray off upon the lands of another person, although uninclosed, is said to be derived from the common law of England, and to be in force in this state. At an early period in this state the common law of England and the statutes of that country of a general nature, in aid of the common law, passed prior to the fourth year of King James I., were adopted by legislative enactment. But this act was repealed by the general assembly of this state on the 2d of January, 1806; since which time the common law of England has had no force in this state derived from legislative adoption. But having been adopted in the original states of the Union and introduced into Ohio at an early period, the common law has continued to be recognized as the rule of decision in our courts, in the absence of legislative enactments, so far as its rules and principles appeared to be based on sound reason, and applicable to our condition [178] *and circumstances. The common law, therefore, has no force in Ohio, except so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts; and this extends no further than it illustrates and explains the rules of right and justice as applicable to the circumstances and institutions of the people of the state. In the case of *Sergeant v. Steinberger*, 2 Ohio, 305, the Supreme Court held that the common law, so far as it related to the subject of the estate by joint tenancy, would not be recognized in Ohio, upon the ground that the *jus accrescendi* was not founded in principles of natural justice, nor in any reasons of policy applicable to our state of society or institutions; but on the contrary, was adverse to the understandings, habits, and feelings of the people.

Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this state, and in accordance with their habits, understandings, and necessities. If this be the law in Ohio now it has been so since the first settlement of the state, and every person who has allowed his stock to run at large and go upon the uninclosed grounds of others has been a wrong-doer, and

liable to an action for damages by every person on whose lands his creatures may have wandered. What has been the actual situation of affairs, and the habits, understandings, and necessities of the people of this state from its first settlement up to the present period in this respect? Cattle, hogs, and other kinds of live stock not known to be breachy and unruly, or dangerous, have been allowed at all times and in all parts of the state to run at large and graze on the range of uncultivated and uninclosed lands. And this prevails not only throughout the country, but also in the villages and cities, except where it may be, to a limited extent, restrained by local municipal ordinances. For many years, in the early settled parts of the state, the people were unable, and at the present time in some parts of the state, they are yet *unable [179 to clear and inclose more ground than that actually needed for cultivation. And there is not at this time inclosed pasture lands sufficient to confine the one-half of the live stock in the state. Even a statutory enactment, imposing the severest criminal punishment for permitting these animals to run at large, could not be enforced without either slaughtering or driving a large portion of them from the state. It has been the habit of the people to inclose their grounds for the purpose of cultivation, and to fence against the animals running at large. And it has been only within a few years, and that only in the better improved parts of the state that uncultivated pasture grounds have been inclosed. And this has not been done because the owners considered themselves required by law to confine their stock within inclosures, but for their own convenience and advantage. So that it has been the general custom of the people of this state, since its first settlement, to allow their cattle, hogs, horses, etc., to run at large, and range upon the uninclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tortfeasors, and liable in damages for letting their stock thus run at large. The existence or inforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the state governments.

The common understanding upon which the people of this state have acted since its first settlement has been that the owner of land was obliged to inclose it with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running

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at large; and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and condition of the people of this state, but inconsistent with the habits, the interests, necessities, and understanding of the people.

180] *Besides this, the legislation of the state has put at rest all question as to the existence of any such rule in Ohio. The proviso in the first section of the statute in relation to strays, recognizes the fact of animals being allowed to run at large upon the range of uninclosed lands, in the following language:

"Provided, That no person shall be allowed to take up any neat cattle, sheep, or hogs, after the first day of April and before the first day of November, annually; nor shall any compensation or fees be allowed to any person for taking up any stray animal from the range where such animal usually runs at large," etc. Swan's Rev. Stat. 883.

The statute regulating inclosures, and providing against trespassing animals (see Swan's Rev. Stat. 426), fixes the requisites of a lawful fence, and in the seventh section provides the remedy when the owner or occupant shall feel himself aggrieved by the animals of another person which run at large breaking into his inclosure; and the twelfth section of the same statute provides that when the fence-viewers shall ascertain any animals to be habitually breachy and unruly, notice thereof shall be given to the owner or keeper, who shall be required thereafter, under a penalty, to restrain such animals from running at large, etc.

This legislation is wholly inconsistent with the doctrine that it is *unlawful* for the owner of animals to allow them to run at large, and that he is liable in damages for a trespass in case they go upon the uninclosed grounds of another. Why the provision to restrain breachy and unruly animals from running at large, if it were the law of the state that the owner should allow none of his stock to be at large, whether breachy or not? And why the provision for the assessment of damages for injury by trespassing animals made to depend upon the contingency of a lawful fence? If the owner of trespassing animals were liable in damages, whether the lands of the injured party were inclosed or not, the provision making the assessment of damages to depend on the existence of a lawful fence would seem to be unnecessary, if not wholly absurd.

*It was adjudged, by the Supreme Court of Connecticut, [181 in the case of *Stadwell v. Ritch*, 14. Conn. 293, that the rule of the English common law, making it the duty of the owner of cattle to restrain them and subjecting him to liability in damages for suffering them to go upon the lands of another, whether inclosed or not, does not prevail in that state, being inconsistent with the situation of the country from the time of the first settlement of the state, and also repugnant to the legislative enactments of the state relating to that subject. On the contrary, it was held that the owners of lands were obliged to inclose them by a sufficient fence before they could maintain an action for trespass done thereon by the cattle of another. The same doctrine was laid down by Judge Swift (see 1 Swift's Dig. 525), and also recognized in the case of *Barnum v. Vandusen*, 16 Conn. 200.

It has been said that in South Carolina a sufficient inclosure was necessary to protect the planter against the inroads of horses, cattle, and hogs, whose right to go at large in the range is derived from the common law of South Carolina. *Town of Beaufort v. Danner*, 1 Strobbart, 175.

It was held by the Supreme Court of the State of Illinois, in the case of *Seely v. Peters*, 5 Gilman, 130, that the common law requiring the owner of cattle, hogs, etc., to keep them on his own land, has never been in force in Illinois; that there is no general law in that state prohibiting cattle from running at large; and that in order to maintain an action for the trespass of cattle on land, the owner of the land must have it surrounded by a sufficient fence. The subject was fully investigated in this case, and the ground on which the decision is placed, is that the common-law rule is inapplicable to the circumstances and condition of the people, and also inconsistent with the legislation of the state.

It is true that the contrary doctrine has been held in a number of the other states, but the grounds upon which it is placed do not appear to have any real practicable application *to the condition [182 of things in this state. It is said that the *purpose* of fences, in the view of the common law, is to keep the owner's cattle *in*, and not cattle of others *out*. The *Tonawanda Railroad Co. v. Munger*, 5 Denio, 255. The reason of a law should never rest in mere abstraction, without any application to the practical affairs of society, and it is a maxim that when the reason of a law ceases, the law itself ceases. Fences have two sides to them, and the real and

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practical purpose of fences in this state has been not only to protect the inclosures of the proprietor from the intrusion of animals without, but also to confine such as may be kept within.

If an action for damages be maintainable for every instance in which the cattle and other live stock of a person go upon the uninclosed lands of another, without express license, more than nine-tenths of the business men of the state become, for this cause, *tortfeasors* every day of the year, and liable to suit for damages. It will not do to say, that although such right of action existed, yet that it would be restrained by the rule *de minimus non curat lex*. This would be a refinement resulting in a distinction without a difference. As there can be no wrong without a remedy, if there could be no recovery, the right of action in reality could not exist.

This doctrine of the common law may be suitable to an old and highly cultivated country, where all the lands except the public highways and commons are under inclosure, but it has no suitable and proper application in Ohio.

There is no law in Ohio, therefore, *requiring* the owner of cattle, horses, hogs, or other live stock, to keep them on his own land or within an inclosure; and when he allows them to be at large on the range of uninclosed lands, he can not be said to act *unlawfully*, or to be guilty of an *omission* of *ordinary care* in the keeping or charge of his stock; for, by so doing, he does nothing more than that which has been customary, and which has been by common consent done 183] generally by the people since the first settlement of the *state. It is true, that extraordinary diligence, or the highest degree of care in the management of his stock, would require the owner to confine it in stables, or within sufficient inclosures; but under ordinary circumstances, all that can be required of a person in the management of his property is, to exercise that degree of care and diligence which men of common prudence (or in other words, which men in general) exercise in taking care of their own property.

This right, however, to allow animals to run at large has its qualifications. The owner of animals known to be mischievous or dangerous, is bound to confine them; and if he omit this duty he is responsible for any loss or damage which any other person may suffer thereby. And whenever the owner is notified of the fact that any of his creatures at large have become troublesome by means of breachy, unruly, or dangerous habits, it is his duty to take them up without delay, and confine them. And the right to allow animals

inoffensive in their habits to run at large, does not imply a *right* in the owner to keep his creatures upon another's uninclosed lands against his consent. On the contrary, the owner of the lands may drive them off as often as they intrude upon his possessions, using no unnecessary violence; or he may at any time exclude them permanently, by the erection of a fence or other means of inclosure. And although there is no law in this state requiring any person to fence or inclose his grounds, yet the owner who leaves his lands uninclosed, takes the risk of intrusions upon his grounds from the animals of other persons running at large; and the owner of the animals, in allowing them to be at large, takes all the risk of their loss, or of injury to them, by *unavoidable accidents* arising from any danger into which they may wander.

Applying the views here expressed to the case under consideration, upon what ground does the plaintiff's claim to reparation in damages rest? Where there is wanton, malicious, or intentional injury done to a person, there is usually no difficulty in determining the liability of the wrong-doer; *but where a party suffering [184 loss seeks redress upon the ground of *mere negligence*, or the *omission of ordinary care* on the part of another in the conduct or manner of prosecuting his lawful business, there are often difficulties requiring close attention, and sometimes the utmost nicety of discrimination.

Admitting the plaintiff's right to allow his domestic animals to run at large under ordinary circumstances, it is claimed that the defendant, having appropriated its railroad track to the exclusive purpose of running its locomotives and trains, and having the undoubted right to pass over its road, unmolested, at usual railroad speed, the plaintiff's hogs had no right to be on the track, and were wrongfully there; and that the plaintiff, in allowing them to be at large in the vicinity of the railroad, where danger was apparent, was *in fault*; and that the injury, therefore, having been caused in part at least by the negligence of the plaintiff, he can not maintain the action.

The defendant's right to the exclusive and unmolested use of its railroad track is undeniable; and it must be conceded that the plaintiff had no *right* to have his hogs on the track, and that they were there improperly. But how came they there? If the plaintiff had placed them there, or, knowing them to be there, had omitted to drive them off, he would have been, perhaps, precluded from all claim to compensation; but it would appear that, in the exercise of

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the ordinary privilege of allowing these animals to be at large, by the plaintiff, they accidentally, and without his knowledge, wandered upon the railroad track. The right of the defendant to the free, exclusive, and unmolested use of its railroad, is nothing more than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary and avoidable injury to another. Finding the animals upon the track, it was the right, and indeed the duty, of the agents of the company to drive them off, but not to injure or 185] destroy *them by unnecessary violence. The owner of a freehold estate in lands, inclosed by a lawful fence, has the right to expel trespassing animals which have broken through his inclosure; but, in doing so, he would become liable in damages to the owner of the animals, if they be injured by the use of unnecessary and improper means; although the latter would be bound to make reparation for the injury done to the former, by the trespassing animals. It is not pretended that the railroad of the defendant was under inclosure, through which the plaintiff's creatures had broken. It is true there is no law in Ohio requiring railroad companies to fence their roads. But when they leave their roads open and unfenced, they take the risk of intrusions from animals running at large, as do other proprietors who leave their lands uninclosed. If a farmer undertake to cultivate his ground in corn without inclosing it, he would doubtless be troubled by the destructive intrusions of cattle running at large, but without a sufficient fence, he could not maintain an action against the owner of the animals for the trespass. Had the defendant protected its railroad by a sufficient fence and cattle-guards, and the plaintiff's animals broken over the inclosure and gone upon the railway track, the plaintiff would no doubt have been liable to the company in damages for the trespass of the animals. The defendant constructed its railroad with a knowledge that it was the common custom of the country to allow domestic animals to run at large upon the uninclosed grounds of the neighborhood; and without the precaution of *inclosing* its railroad, the company could not sustain an action against the owner of such animals at large, as might happen to wander upon the track of the road. The owner of the animals, in allowing them to run at large, takes the risk of the loss or injury to them by unavoidable accident; and the company,

in leaving its road unprotected by inclosure, runs the risk of the occasional intrusions of such animals upon its road, without any remedy against the owner.

*The question in this case, however, is what decree of care, [186 if any, was the defendant bound to use under the circumstances, to avoid injury to the plaintiff's property? That the plaintiff was in the exercise of the highest degree of care over this property, can not be fairly claimed. A *very prudent* man would not allow his stock to run at large in the immediate vicinity of an uninclosed railroad, where the animals might accidentally, and without his knowledge, wander off upon the railway track. The plaintiff, therefore, being in one respect in fault, it is claimed that he can not maintain his action, even although the defendant could have avoided injury to the animals by the use of ordinary care and caution.

It is true that a party in an action for negligence can not recover damages which have resulted from his own negligence and want of care; and it has been held that the party seeking the redress, must not only show his adversary to be in the wrong, but also must be prepared to prove that no negligence of his own has tended to increase or consummate the injury. But the doctrine that where *both parties are in fault*, the party sustaining the injury can not recover, is subject to several very material qualifications. An effort has been made, however, to sustain its general application upon the idea of a mutuality of obligation to observe due care and caution; and that negligence by one person, absolves another from the duty of care and diligence toward him. In the case of *The Tonawanda Railroad Company v. Munger*, 5 Denio, 266, the court said: "Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect toward a wrong-doer." This idea, however, that the liability in damages for negligence depends upon any mutuality of obligation, is more fanciful than real. Puffendorf places the right *to reparation [187 upon the ground of an original moral duty, in language both graphic and expressive, as will appear by the following extract:

"In the series of absolute duties, or such as oblige all men ante-

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cedently to any human institution, this seems with justice to challenge the first and noblest place, *that no man hurt another; and in case of any hurt or damage done by him, he fail not to make reparation.* For this duty is not only the widest of all in its extent, comprehending *all men*, on the bare account of their *being men*; but it is at the same time the most easy of all to be performed, consisting, for the most part, purely in a negative abstinence from acting, except that its assistance is sometimes necessary in restraining the laws and passions, when they fight and struggle against reason, among which rebellious desires, that boundless regard which we sometimes show to our own private advantage, seems to be the principal and the ringleader. Besides, it is the most necessary of human duties, inasmuch as a life of society can not possibly be maintained without it. For suppose a man to do me no good, and not so much as to transact with me in the common offices of life, yet, provided he do me no harm, I can live with him in some tolerable comfort and quiet."

"It is beyond doubt that he who offers damage to another out of an *evil design*, is bound to make reparation, and that to the full value of the wrong, and of all the consequences flowing from it. But those likewise stand responsible who commit an act of trespass, though not designedly, yet by such piece of *neglect* as they might easily have avoided. For it is no inconsiderable part of social duty to manage our conversation with such caution and prudence that it do not become terrible or pernicious to others; and men under some circumstances and relations are obliged to more exact and watchful diligence. Indeed, the slightest default in this point is sufficient to impose a necessity of reparation, unless under one of these exceptions, either that the nature of the business was such as disdained a care more nice and scrupulous, or that the party who receives the wrong is *no less in fault than he who gives it*; or, lastly, that some perturbation of mind in the person, or some extraordinary circumstances in the affair, leaves no room for accurate and considerate circumspection; as suppose a soldier in the heat of an engagement should hurt his next man with his arms while he brandishes and employs them against the enemy. To this purpose the story in *Ælion* is remarkable. A young man traveling toward Delphi, as he defended his companion from the robbers, happened to kill him by an unlucky turn of his weapon; and, upon application to the Oracle, received his pardon in this comfortable answer:

"Striving to save your hapless friend, you've slain;
His blood may *purify*, but ne'er can stain."

"But in cases of pure chance, where the hurtful action is not mixed with any fault of ours, it is evident we are not obliged to reparation. For when I have done nothing that can be fairly laid to my charge, there seems to be no reason why the misfortune and the damages of a harm, which I unwillingly caused, should rather fall

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on me than on the person who received it." 3 Puffendorf's *Laws of Nature*, chap. 1.

*Rutherford, in his *Institutes of Natural Law* (p. 201), gives [188 the origin of the right to reparation in damages in the following language:

"As the law of nature forbids us to hurt any man, it can not allow any act of ours whereby another is hurt to stand good, or to obtain any effect. But the law, if it does not allow such act to stand good, or to obtain any effect, must, after we have done it, require us to undo it again. The only way of undoing it again, or of preventing the effect of it—that is, the only way of satisfying the law—is to make amends for what any person has suffered who was hurt by it, or to make reparation for the damages which such person has sustained. The same law, therefore, which guards a man from being hurt by requiring others not to hurt him, gives him a demand upon them, when they have done him any hurt, to undo it again, or give him a right to demand reparation of damages. If such reparation be refused, the law gives him a right to it, and allows him to support this right by all such means as are necessary for that purpose, because a right which he is not at liberty to enforce or bring into execution, is, in effect, no right at all."

It would seem that the liability to make reparation for an injury rested not upon the consideration of any reciprocal obligation, but upon an original moral duty, enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another. It is conceded that where the conduct of the party complained of has been *malicious*, or his *negligence* so *wanton* and *gross* as to be evidence of voluntary injury, the injured party is entitled to redress, although there has been negligence on his part. *Wynn v. Allard*, 5 W. & S. 524; *Munroe v. Leach*, 7 Met. 274; *Farwell v. Boston & Worcester Railroad Company*, 4 Met. 49. But where the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care and caution, and the parties are mutually in fault, the negligence of both being the *immediate* or *proximate* cause of the injury, it would seem that a recovery is fairly denied, upon the ground that the injured party must be taken to have brought the injury upon himself. For the parties being mutually in fault, there can be no apportionment of the damages, no rule existing to settle in such case what the one shall pay more than the other.

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189] *This rule, however, that where both parties are in fault, and the negligence of each a *proximate* cause of the injury, no action will lie, has been chiefly applied to cases of collision between vessels, carriages, etc., passing on the public thoroughfares.

The mere fact, however, that one person is in the wrong, does not in itself discharge another from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. There have been numerous adjudications both in England in this country, where parties have been held responsible for their negligence, although the party injured was, at the time of the occurrence culpable, and in some of the cases, in the actual commission of a trespass.

In the case of *The New Haven Steamboat and Transportation Co. v. Vanderbilt*, 16 Conn. 421, the Supreme Court of Connecticut held it to be a principle of law, that while a party, on the one hand, shall not recover damages for an injury which he has brought upon himself, neither shall he, on the other hand, be permitted to shield himself from an injury which he has done, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then it would seem that the party setting up such defense is bound to use common and ordinary caution to be in the right. This decision was founded on the authority of *Butterfield v. Forrester*, 11 East, 58, in which Lord Ellenborough said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them."

In the case of *Birge v. Gardiner*, 19 Conn. 507, where the defendant having set up a gate on his own land, by the side of a lane through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, were accustomed to pass from their places of *residence to the highway, the plaintiff, in passing along such lane, without the liberty of any one, put his hands on the gate and shook it, in consequence of which it fell on him and broke his leg, the Supreme Court of Connecticut said: "There is a class of cases in which defendants have been holden responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences;" and held in this

case that if the defendant was guilty of negligence, he was liable for the injury, unless the plaintiff, in doing what he did, was guilty of negligence or misbehavior, or of the want of proper care and caution; and that in determining this question it was proper to take into consideration the age and condition of the plaintiff, etc., and that the fact that the plaintiff was a trespasser in the act which produced the injury complained of, would not necessarily preclude him from a recovery against a party guilty of negligence." This decision was sustained by the authority of *Lynch v. Nurdin*, 1 Adol. & Ellis, 35 (2 Stephen's Nisi Prius, 1015), which was an action for negligence committed by the defendant's servant, in leaving his cart and horse standing for half an hour in an open street, and while there the plaintiff, with other children, got into and about the cart, and teased the horse, which moved, whereby the plaintiff was injured. Lord Denman, C. J., said:

"In the present case the fact appears that the plaintiff has done wrong; he had no right to enter the cart, and, abstaining from doing so, he would have escaped the mischief. Certainly he was a co-operating cause of his own misfortune, by doing an unlawful act; and the question arises whether that fact *alone* must deprive the child of his remedy. The legal proposition, that one who has, by his own negligence, contributed to the injury of which he complains, can not maintain his action against another in respect of it, has received some *qualifications*. Indeed, Lord Ellenborough's doctrine in *Butterfield v. Forrester*, which has been generally adopted since, would not set up the want of a *superior* degree of skill or care as a bar to the claim for redress. *Ordinary *care* [191 must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation."

The same doctrine was substantially recognized in the case of *Chaplin v. Hawes et al.*, 3 Carr. & Payne, 554, in which Best, C. J., remarks:

"If the plaintiff's servant had such a clear space that he might easily have got away, then, I think, he would have been so much to blame, as to prevent the plaintiff's recovering. But, on the sudden, a man may not be sufficiently self-possessed to know in what way to decide; and in such a case, I think the wrong-doer is the party who is to be answerable for the mischief, *though it might have been prevented by the other party's acting differently.*"

In the case of *Bird v. Holbrook*, 15 Eng. Com. L. 91, it was held,

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that where the defendant, who, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff having climbed over the wall, in pursuit of a stray fowl, was shot, he (the defendant) was liable in damages, although the plaintiff brought the injury upon himself by trespassing upon the defendant's inclosure.

The case of *Vere v. Lord Cawder*, 11 East, 567, was an action of trespass for shooting and killing a dog of the plaintiff, in which it was held that a plea in bar constituted no justification, which set forth that the lord of the manor was possessed of a close, and that the defendant, as his game-keeper, killed the dog when running after hares in that close for the preservation of hares, the plea not averring that it was *necessary* to kill the dog for the preservation of the hares, etc. In this case, Lord Ellenborough, C. J., said: "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which *outrages all reason and sense*, it is of no authority to govern other cases."

[192] *The same doctrine was recognized in the case of *Mariott v. Stanly*, 39 Eng. Com. L. 559. Also in the case of *Raisin v. Mitchell et al.*, 38 Eng. Com. L. 252, in which a jury returned a verdict in favor of the plaintiff—for £250—with a *special finding, on inquiry, that there were faults on both sides*; and it was held that notwithstanding this, the plaintiff was entitled to the verdict, *as there might be faults with the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering*. The same subject was very fully considered in the case of *Deane v. Clayton*, 2 Eng. Com. L. 183, in which Dallas, J., remarks: "To the next class of decisions I also equally accede; namely, those which establish that you shall do *no more than the necessity of the case requires*, when the excess may be in any way injurious to another; a principle which pervades every part of the law of England, criminal as well as civil, and indeed belongs to all law that is founded on reason and natural equity."

It is upon this ground, that where domestic animals even, which are breachy and unruly, break into the lawful inclosure of another, the owner of such inclosure, although he has a right of action for the trespass, and has the right to expel the trespassing animals from his grounds, and that quickly, and with no very kind treatment; yet, in so doing, he is not allowed to use *unnecessary* or ex-

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cessive violence; and if he does, and the animals be *killed or injured* thereby, he will be liable to the owner of the animal in damages. This is in strict accordance with the decision in the case, *Vere v. Cawder*, above mentioned. To the same effect is the case of *The Mayor of Colchester v. Brooke*, 33 Eng. Com. L. 376, cited in 1 Smith's Leading Cases, 312, where it was held, that although the plaintiff was chargeable with wrong and negligence in placing and keeping the deposit of a bed of oysters in the channel of a navigable stream, which created a public nuisance, yet the defendant was not justifiable in running his vessel upon the deposit, greatly injuring the oysters, when there was room to pass in the stream without it, and the injury could have been avoided by the *use of reasonable care and diligence. This is only carrying out the rule, that though a man do a lawful thing, yet if any damage thereby be done to another, which he could have reasonably and properly avoided, he will be held liable. So, it is said, if a man lop a tree on his own ground, and the boughs fall upon another's premises, *ipso invito*, and do an injury, an action lies. So, also, where a man, in building his own house, lets fall a piece of timber on his neighbor's house, and injures it; and likewise, where a party so negligently constructed a hay-rick on the extremity of his land, that in consequence of its spontaneous ignition, his neighbor's house was burnt down, an action has been sustained. *Vaughan v. Menlove*, 3 Bing. (N. C.) 468.

And where persons have the control of instruments of danger, the law, out of regard to the safety of the community, requires them to be kept with the utmost care; so that where a party being possessed of a loaded gun, sent a young girl after it, with directions to take the priming out, which was accordingly done, but a damage was done to the child of another person, in consequence of the girl presenting the gun at him, and drawing the trigger, when the gun went off, the party was held liable in damages to the person injured. *Dixon v. Bell*, 5 M. & S. 198.

Another modification of the rule, that the concurrence of the plaintiff's negligence with that of the defendant, will defeat the claim to reparation, is, that where the plaintiff, knowing the danger, voluntarily placed his property in an exposed and hazardous position, or in more than ordinary danger, from the lawful acts of the defendant. *Sedgwick on Damages*, 471. This principle was settled by the Supreme Court of New York, in the case of *Cook v. The*

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Champlain Transportation Company, 1 Denio, 99, in which it was held that where a person, in the lawful use of his own property, exposes it to the danger of accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons; so that the owner [194] of land on the shore of a *stream or lake, or adjoining the track of a railroad, may lawfully build on his land, though the situation be one of exposure and hazard, and be nevertheless entitled to protection against the negligent acts of persons lawfully passing the same with vessels or carriages propelled by steam engines, by which said buildings may be set on fire, on the ground that the owner undertook the risk and hazard of injury by *mere accident*, but not the risk of injury by *negligence*.

But there is yet another element in this class of cases, which occasionally has an important bearing upon the right of redress. The negligence of the injured party to preclude him from a recovery, must be in part, at least, an *immediate* or *proximate cause* of the injury. To this effect was the decision of the case of *Davies v. Mann*, 10 M. & W. 545.

"The plaintiff having fettered the fore feet of an ass belonging to him, turned it into a public highway; and at the time in question, the ass was grazing on the off side of a road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a 'smartish pace,' ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses. The learned judge (Erskine, before whom the case was tried at the Worcester assizes), told the jury, that 'though the act of the plaintiff, in leaving the donkey on the highway, so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal; still, if the *proximate* cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant;' and his lordship directed them, if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff."

[195] *After a verdict for the plaintiff, on a motion for a new trial, which came before the exchequer, Lord Abinger said:

"I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there. But even were it otherwise, it would have made no difference; for, as the defendant might, by the exercise of proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."

The Supreme Court of Vermont, in the case of *Trow v. The Vermont Central Railroad Co.*, 24 Vt. 488, in which this doctrine is fully sustained, said: "When the negligence of the defendant is *proximate*, and that of the plaintiff *remote*, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet, if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. So, in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the highway, the defendants were bound to the exercise of reasonable care and diligence in the use of their road, and management of the engine and train, and if, for want of that care, the injury arose, they are liable."

From a review of the decisions on this subject, both in England and in this country, the following conclusion appears fairly deducible:

That the general rule is, that where the parties are mutually in fault, or in other words, where negligence of the *same nature*, in each party, has co-operated to produce the injury, the party sustaining the loss is without remedy; but that this rule is subject to the following qualifications:

1. The injured party, although in the fault to some extent, [196 at the same time may, notwithstanding this, be entitled to reparation in damages for an injury, which could not have been avoided by ordinary care on his part.

2. When the negligence of the defendant in a suit upon such ground of action is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission, not occurring at the time of the injury, the action for reparation is maintainable.

3. Where a party has in his custody or control dangerous implements, or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury, he may be entitled to redress.

4. And where the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care and caution on the part of the defendant, he is entitled to reparation for the reason that, although by allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing ordinary care and prudence, or in other words voluntarily incur the risk of injury by the negligence of another.

The application of these rules, which appear *reasonable and just*, removes all difficulty in the disposition of the case before us. The act of the plaintiff allowing his hogs to be at large in the neighborhood of the railroad, where they were exposed to the danger of getting upon the railway track and being injured, was only a *remote cause* of the injury; and in the voluntary exposure of his property to danger in the exercise of his lawful rights, he took upon himself the risk of injury to his property by *mere accident*, but not the risk of injury by the defendant's *negligence*. And the defendant was chargeable with some degree of negligence by the omission to have its railroad inclosed by suitable fences and cattle-guards. On this subject, the Supreme Court of Vermont,* in the case of *Trow v. The Vermont Central R. R. Co.*, before mentioned, say: "The duty of maintaining fences and erecting cattle-guards for such purposes is imposed on the corporation not only as a matter of safety in the use of their road and running their engines thereon, but also as a matter of security to the property of those living near and contiguous to the road. And this arises from the consideration that they must know, and reasonably expect, that without such precautions such injuries will naturally and frequently arise. And when, for the distance mentioned in this case, no precautions of that kind were used upon this road, and in a place so public and common, we think, as a matter of law, there was that neglect which will render the corporation liable for injuries arising solely from that cause."

This is in accordance with the decision of the same court in the case, *Quimby v. The Vermont Central R. R. Co.*, 23 Vt. 388, in

which it was held: "That although the charter of the company made no provision in reference to the obligation to maintain fences upon the line of the road, the general law of the state, in reference to the obligation of adjoining land-owners to maintain the division fences between them, did not apply, but that the obligation to maintain the fences rested primarily upon the company, and until they have either built the fences, or paid the land-owner for doing it, a sufficient length of time, to enable him to do it, the *mere fact* that cattle get upon the road from the land adjoining, is no ground for imputing negligence to the owners of the cattle." So, also, the case of *The Matter of the Rensselaer & Saratoga R. R. Co.*, 14 Paige, 553.

It being the right of the owners of animals in this state to let them be at large, it follows that the *mere fact* of allowing them to be at large, generally, can not be a ground of imputing negligence to the owner. But when the owner allows them to be at large in the immediate vicinity of an uninclosed railroad, where they will be liable to wander upon the railroad, he can not be said to exercise that high degree of care and prudence in reference to his own interests which *men of *more* than ordinary care and caution [198 take of their own property. And admitting the plaintiff, in this case, to have been chargeable in some degree with negligence in this respect, yet the defendant was certainly chargeable with negligence, in at least an equal degree, for want of proper care in inclosing its railroad with fences and cattle-guards. The construction of the railroad could not abridge or take away the existing right of persons to allow their animals to be at large, although the danger which it created may have enjoined more care and prudence on the owners of animals in letting them be at large in the immediate neighborhood of the road. But the company having constructed its road through a country where it was well known that domestic animals were suffered to run at large, and where the custom and right in this respect must be unquestionable, the consideration of the inevitable exposure of the road while uninclosed to such casualties and injuries, as that of animals running at large, getting upon it, enjoined upon the company, in the exercise of at least some degree of care and caution, the duty of inclosing the road. And, by the omission of this, the defendant was, *at least*, as much in fault, and *at least* as much chargeable with negligence as the plaintiff. And in each case, that is, in allowing the animals to be at large by the plaintiff, and in leaving the railroad uninclosed

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by the defendant, the negligence was *remote*, each only remotely or consequentially contributing to cause the injury. If there had existed no other negligence than this, on either side, and the loss had occurred from unavoidable accident in running the train upon the hogs, when the agents of the company were in the full exercise of due care and caution in the discharge of their duty; the plaintiff would probably have been without redress. The turning point of this case, therefore, as presented, would seem to be, not whether there was negligence on the part of the plaintiff in allowing his hogs to be at large, or negligence on the part of the defendant in omitting to inclose its road by fences and cattle-guards, but whether 199] the agents of the defendant at the time *of the occurrence exercised reasonable and ordinary care to avoid the injury. Having left its road uninclosed, and exposed to the intrusion of the animals at large coming upon the track, it was the duty of the company, acting through its agents, to use ordinary and reasonable care and diligence to avoid all unnecessary injury to the animals found accidentally in the way of its train upon the road.

What amounts to ordinary care on the part of the agents of the company, depends on the peculiar nature of the employment, and the circumstances attending the transaction. The defendant's agents were engaged in the management of powerful and dangerous machinery, moving with great rapidity, to the skillful and safe conduct of which is intrusted not merely property, but the safety of human beings to a large extent. The first and paramount object of the attention of the agents of the company is a proper regard for the safety of the persons and property in their charge on the train. The plaintiff had no right to expect his property, under the circumstances, to be protected, unless it could be done consistently with the higher obligations and responsibilities resting on the agent of the defendant. In this particular employment a higher degree of skill and diligence is exacted of the persons engaged than that which is requisite in the ordinary pursuits of life. For the protection of the persons and property of individuals in charge of the agents of the defendant on the train of cars, the company was held to a high degree of care and diligence; and with a due regard to this paramount duty they were bound to the exercise of what, in that peculiar employment, would be ordinary and reasonable care to avoid doing any unnecessary injury to the property of the

plaintiff which happened, accidentally, to be upon the railway track.

The court of common pleas, however, in this case refused, upon request, to charge the jury that the agents of the defendant were held to the exercise of *ordinary care and caution* to avoid injury to the plaintiff's property thus upon the railroad; but on the contrary charged that the hogs, being unlawfully *on the road, the de- [200 fendant's agents were not required to check the speed of the train and avoid injury to the animals, even if they could easily and readily have done so.

This ruling of the court of common pleas is in direct conflict with the doctrine of Lord Ellenborough, in the case of *Vere v. Cawdor*, in which he said: "That the idea that the plaintiff's dog had incurred the penalty of death by running after a hare on another's ground, *outrages all reason and sense*;" in conflict with the doctrine that even in case of a trespass, no *unnecessary* and *excessive* violence shall be used to the injury of another, a principle which Dallas, J., said "pervades every part of the law of England, criminal as well as civil, and indeed, belongs to all laws that are founded on reason and natural equity;" contrary to the humane spirit of our laws against cruelty to animals; contrary to the doctrine that a man, in the exercise of his lawful rights, shall use reasonable and ordinary care to avoid injury to another; and contrary to the whole course of adjudication in England and in this country generally, on *mere questions* of negligence.

But it is due to the court below to say that its charge to the jury was in strict accordance with the decisions in New York, Pennsylvania, and perhaps those of several other states, in cases of suits against railroad companies upon grounds similar to that for which this suit was brought. But the decisions in those states all rest upon the ground that it is *unlawful* for the owners of domestic animals to allow them to be at large; and that when they are at large, and happen to stray upon a railroad, the persons in charge of trains on it are absolved from the duty of using care to avoid unnecessary injury to them. It has been shown that this doctrine has no application in this state; those decisions, therefore, are of no authority here. We recognize the maxim, *sic utere tuo ut alienum non lædas*, as a principle founded in justice, and essential to the peace, order, and well-being of the community, as applicable to the enjoyment of all property, and the exercise of all rights *incident thereto; to [201

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the protection of which the *weakest* are entitled, and from the observance of which the most *powerful* are not exempt.

For the error in the charge of the court below to the jury, the judgment is reversed, and the cause remanded for further proceedings.

THE CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD COMPANY
v. ANTHONY KEARY.

Corporations are liable for injuries arising from the negligence or carelessness of their agents and officers, in the course of their employment, in the same manner and to the same extent as private individuals.

The common law of England, when not inconsistent with the genius and spirit of our own institutions, and thus rendered inapplicable to our situation and circumstances, furnishes the rule of decision in the courts of this state.

It is a settled maxim of the common law, founded upon the highest obligations of social duty, that every one shall so use his own, and so prosecute his lawful business, as not, by his negligence or want of care, to injure others. Hence, the law exacts of him who puts a dangerous force in motion, that he shall control it with reasonable care and skill.

He can not divest himself of this obligation by committing its control to another, but he still remains liable, upon the maxim *respondet superior*, for such injuries as arise from the negligence or carelessness of his agent while engaged in the prosecution of a business.

These principles apply where a railroad company place a brakeman in their employ under the control of the conductor, the latter having the exclusive command of the train, and the brakeman, without fault on his part, is injured by the carelessness of the conductor. In such case, the brakeman is entitled to recover of the company for the injury, the conductor being the sole and immediate representative of the company, upon which rested the obligation to manage the train with skill and care.

But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion.

This distinction arises from the nature of the relation of master and servant, and from the express and implied obligations incident to the contract of service. As between *them*, the company undertakes to furnish suitable machinery and apparatus, and control it with prudence and care. The

202] *servant undertakes to obey and perform as he is directed—the com-

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pany reserving to itself the power of control, as between it and the servant, assumes the obligation to do it with care and skill; and a failure to do so, whether arising from the fault of the corporation, or its representative appointed for the purpose, is a breach of this obligation.

But when the failure occurs in that branch of the service committed by the principal to their subordinate servants, it is their fault, and not that of their employer, and a breach of their obligations, and not his; and where they enter the service with a knowledge that several are to be engaged, each takes upon himself the hazards of the employment, including that of negligence by fellow-servants, and public policy requires that they should be interested in exercising supervision over each other.

The agent or officer intrusted with power and control over the subordinates, and the operations of the business, is not engaged in a common service with them, admitting of joint participation; nor is he, in any just sense, their fellow-servant; but their employments are separate and distinct, although both are necessary to a successful result in the business.

The case of *Stevens v. Little Miami Railroad Co.*, 20 Ohio, 415, examined and affirmed.

ERROR to the district court of Cuyahoga county.

Bishop, Backus & Noble, for plaintiff in error.

Tilden & Payne, for the defendant.

RANNEY, J., delivered the opinion of the court.

The questions presented in this case arise upon a bill of exceptions taken to the instructions of the court below, given to the jury on the trial. Only so much of the evidence as is necessary to show the pertinency of those instructions, is before us. The plaintiff below was in the employ of the defendant, as a brakeman on one of their trains, and was very seriously and permanently injured by a collision between the train and a locomotive, also belonging to the defendant. He gave evidence tending to prove that the injury was occasioned without his fault, through the negligence and carelessness of the conductor of the train; the plaintiff at the time, by the rules and regulations of the company, being subject to the orders of said conductor. He also gave evidence, to show that the injury was caused by the negligence and carelessness of the superintendent of the *road, to whose orders, by the regulations of the [203 company, he, as well as the conductor was subject at the time of the injury. The defendant's counsel prayed the court to instruct the jury, that neither state of the facts would entitle the plaintiff to re-

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cover, provided the company had placed in these positions, persons of competent care and skill. But the court refused the instruction, and did charge the jury, that, if they were satisfied, from the evidence, that the injury to the plaintiff was occasioned by the negligence or carelessness of either the conductor or superintendent, under whose control he was placed by the company, and acting at the time, and without his fault, he was entitled to recover such damages as would compensate him for the injury. Under this instruction, the jury returned a verdict for the plaintiff for \$6,050, upon which, after overruling a motion for a new trial, the court entered a judgment.

It is not denied by counsel for the plaintiff in error, that the charge of the court below was in strict accordance with the holding of the late court in bank in the case of the Little Miami Railroad Co. v. Stevens, 20 Ohio, 415. In that case, as in this, it was left in doubt whether the negligence complained of, and upon which the jury found their verdict, was that of the superintendent or conductor. In this case, as in that, it is necessary to find the company liable for the negligence or carelessness of both the superintendent and conductor, before the judgment can be affirmed, as the instruction covered both, and it can not now be told upon which the carelessness and negligence was fixed by the evidence. But whether upon the one or the other, we must assume that the plaintiff below, in accordance with the rules of the company, was acting under his orders and control at the time he received the injury. We assume, therefore, as most favorable to the defendants below, that the negligence was that of the conductor. In the case cited, it was held that where an employer places one person in his employ under the direction of another also in his employ, such employer is liable for injury 204] to the person placed in the *subordinate position, by the negligence of his superior. And in the application of this principle to the case under consideration, it was held that the railroad company, having placed the engineer in their employ under the control of the conductor, who directed when the cars were to start, stop, etc., was liable to the engineer for any injury received by him occasioned by the negligence of the conductor, while they were both engaged in their respective employments. The correctness of that decision is denied; and, as it was made by a divided court, and is claimed to be in conflict with several cases decided elsewhere by courts of acknowledged learning and ability, we have very carefully and

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cheerfully examined the grounds upon which it was placed, with the full confidence that the able counsel engaged in this case have brought to our attention every consideration necessary to the full understanding of the question; and I am now instructed to declare, as the unanimous opinion of this court, that the law was then correctly administered, and the rule laid down, such as meets our unqualified approval.

I shall take no time to prove that this corporation, and every other prosecuting a lawful business, is entitled to the same rights, and subject to the same liabilities, when not otherwise provided by law, as a private individual. This has been too often affirmed by this court and the courts of our sister states, to be now a matter of doubt. Indeed, a corporation is but an aggregation of individuals, to whom legal unity is given, endowed with certain capacities for their own interest and advantage. It would, indeed, be singular if they were, for that reason, exempted from the liabilities for injuries to which, without their beneficial capacities, they would be subject. As stated by the Supreme Court of the United States, in *Marshall v. The Baltimore and Ohio Railroad Co.*, 16 How. 327, "These important faculties, conferred on them by state legislation for their own convenience, can not be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals *subtly with words and [205 names, without regard to the things or persons they are used to represent."

We therefore treat this case the same as though the road had been owned, and the trains run, by a private individual. If, under the circumstances, such private individual would be liable, the company is liable.

We profess to administer the common law of England, in so far as its principles are not inconsistent with the genius and spirit of our own institutions, or opposed to the settled habits, customs, and policy of the people of this state, thereby rendering it inapplicable to our situation and circumstances.

It has not been adopted by express legislative enactment, but brought to the old states by our fathers, and constantly claimed as their birthright. Its introduction here by their descendants was almost a matter of course, and its terms and foundation principles have been so interwoven with our constitution and laws, so blended

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with the remedies we afford, and so constantly enforced by our courts, that its implied recognition by the government and the people, may be fairly assumed; and if it can not be said to be in force as the common law of England, it may not inaptly be termed the common law of Ohio. To it we constantly resort, when the positive law is silent or insufficient. Built up, as it has been, from the experience of ages, and constantly adapting itself to the business and relations of men in society, we seldom fail to find principles which, if carried to legitimate results, are not altogether sufficient to settle every controversy. If no precedent is found for a remedy to enforce an acknowledged right, one of its own cherished principles requires us to adapt one to the exigency, and to make good the maxim, that there is no legal right without a legal remedy.

Whatever is not prohibited, may be lawfully done. Whatever a man possesses, that the law recognizes as property, may be used for his benefit, in a lawful manner. What it allows to one, 206] it allows to all, and secures to all the enjoyment. Hence, in prosecuting his own lawful business, and in the use of his own property, he must submit to the great social necessity of so using his own as not to injure others. While they are his legal right, *this* is his legal duty. They go hand in hand, and the law scrupulously respects the one, and rigorously enforces the other. It treats man as a rational and intellectual being, capable of understanding his duties to his fellow-men, and requires of him, in his intercourse with them, to exercise a constant regard for their rights. In the complicated relations of civilized society, no force can be employed, no business pursued, which is not likely to result in injury to others, unless it is controlled and directed by an intelligent will, conscientiously and carefully employed to prevent it. The law, therefore, exacts of him who puts a force in motion, that he shall skillfully and carefully control it, and with a skill and care proportioned to the power of the person he thus employs. The skill and care must be reasonable, and it is not reasonable when it does not furnish at least ordinary security against injury to others. If he is found wanting in this, and injury ensues, he has failed to perform his duty to his fellow-man, and the right to receive and the duty to make reparation, immediately arise.

This liability, when the power which produces the injury is under the direct and immediate control of the owner, it is agreed, is sub-

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ject to no exception. It extends to every kind of business, and to every human being, in or out of his employ.

But the principle does not stop here. What he can do for himself, he can, if his interest, convenience, or pleasure requires it, do by another. He can place the power and control of the force he employs, under the direction of his substitute. To make it safe to others, it requires the same care and skill as though he had retained it; and as it is still used for his benefit, and by his direction, he can not, in this manner, release himself from any part of the obligation he owes to others, to use it with reasonable care and skill. In *such case, it is his will that the mind of his substitute should [207] control its operations, instead of his own; and while he may lawfully make this substitution, he can not escape responsibility to those who are injured by the failure of his substitute to discharge his duty with skill and care. The rule is thus stated by Judge Story (Story on Ag. 452): "It is a general doctrine of law, that, although the principal is not ordinarily liable (for he sometimes is), in a criminal suit for the acts and misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds, yet he is held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify, or participate in, or, indeed, know of, such misconduct, or, even if he forbade the acts, or disapproved of them. In all such cases. the rule applies *respondeat superior*, and it is founded upon public policy and convenience; for, in no other way, could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case, the principal holds out his agent as competent, and fit to be trusted, and thereby, in effect, he warrants his *fidelity and good conduct, in all matters within the scope of the agency.*"

Under the operation of this doctrine, social duty and public policy combine to make the principal liable for the negligence and carelessness of his agent, in the same manner and to the same extent as though it was his own. It is his duty to make reparation for injuries arising from the careless management of forces employed for his benefit; and it is the policy of the law to make him sensible of this responsibility, that he may be the more careful in selecting his agents, and also that those who are injured may have a certain and

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responsible resource for redress. It is sometimes thought to be a hard rule, in cases where the principal himself has not been negligent, or guilty of intentional wrong; *but when it is remembered that, even in such cases, some innocent person must suffer, it seems to be as manifestly just as it is clearly the law that the loss should fall upon him who has put it in the power of another to commit the injury, and for whose benefit and advantage alone the force was employed.

These being the general principles of the common law, the question arises, whether those who receive injuries, while engaged in the employment of the principal, from the negligence or carelessness of those placed over them by him, are excluded from the protection these rules were designed to afford. The verdict finds the defendant in error without fault. He engaged to serve the company in the capacity of brakeman, and to submit in all things to the orders and control of the conductor who might be placed over him by the company, and put in charge of the train. While performing his duties faithfully, in accordance with his contract, he is injured by the carelessness of the conductor, to whose control he has been subjected by the company. He had no power to determine who this conductor should be, and no right to control or participate in the duties which the company had devolved upon the conductor. He had, by his contract, promised obedience; and this the company had a right to require, and they received it. Did they come under no obligations to him? If he was bound to perform with diligence and care the orders of the company, given by their substitute, the conductor, were they not bound to govern him with a proper regard to his safety? Aside from his rights under the contract of service, he was a man, whose life and limbs were as valuable to him as though he had never entered their service; and, as such, had he no right to require that they should perform toward him, as well as others, the great law of social duty, to so use their own as not to injure others?

While it is conceded they would be liable to those not in their employ and under their control, can the law be less regardful of the 209] rights of those from whom all power to provide *for their own safety is taken, and who are obliged to occupy posts of danger, whether directed with care and skill or the contrary?

But one answer to these questions, that any man can understand, has ever been given, and it is this: that by entering the service

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of the principal, the employe takes upon himself all the hazards arising from the carelessness and negligence of those that the employer has placed over him, in charge of the business, and by his contract releases the employer from all liability from injuries received from such causes. That this is expressed as a part of the contract is not pretended ; but it is supposed necessarily to spring from it, and to be enforced from considerations of public policy.

That the servant takes upon himself all the ordinary risks incident to the business, including liability to injury from the negligence of other servants employed with him by the common principal, but having no control over the business, or the servant who receives the injury, we are quite ready to admit. In such case they stand to each other as equals, and are alone liable for the injuries they inflict. But that the principal is, by anything incident to the contract of service, released from his obligation to everybody, to superintend and control the business with care and prudence, so as to prevent injury, we think, wholly unsupported by reason, and as yet, nearly so by authority.

No one has the right to put in operation forces calculated to endanger life and property, without placing them under the control of a competent and ever-active superintending intelligence. Whether he undertakes it, or procures another to represent him, the obligation remains the same, and a failure to comply with it in either case, imposes the duty of making reparation for any injury that may ensue. When one enters his employment in a subordinate situation, and agrees to be subject to his orders, either directly or indirectly given, he has a right to expect that his employer will perform *the duty resting upon him, to furnish [210] suitable machinery, and control it with care and prudence. Whenever the law recognizes duties, it imposes corresponding obligations. It is the duty of the owner to superintend and control the forces he employs, and the duty of the servant to obey and perform under his directions ; and, certainly, in the absence of positive stipulations, the law will not, as between themselves, throw those which belong to the one, on to the other, or refuse to enforce the obligations which either may have incurred.

As corporations can act only through their agents and officers, authorized to exercise the functions conferred by their charters, there is much force in the view of the late C. J. Hitchcock, that the superintendent (and conductor when running a train) of a

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railroad, ought to be regarded as the proper representatives of the company, and their acts considered as those of the company. But I do not think it necessary to insist upon this position. Let the company be liable only upon the maxim *respondeat superior*, or upon the obligations arising out of the contract of service, and in either view, their liability for injuries to their subordinates, caused by the carelessness of the conductor they have placed over them, in charge of the train, is in our opinion, sufficiently apparent. This conclusion rests wholly upon the idea that the company, from the very nature of the contract of service, is under obligations to them, as well as they to the company; and that among these obligations is that of superintending and controlling, with skill and care, the dangerous force employed, upon which their safety so essentially depends. For this purpose the conductor is employed, and in this, he directly represents the company. They contract for, and engage his care and skill. They commission him to exercise that dominion over the operations of the train, which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the dis-
211] charge of a duty which the owner, as a man and a *party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him, and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation; and no servants are fellow-servants, when one is placed in control over the other. The servants employed to execute can not recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others must be engaged, and they were jointly bound to perform what was jointly intrusted to them, and public policy may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not pre-

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sumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and equally so, how the safety of travelers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness, that of the company that places him in power.

But it is very confidently claimed that this view of the law is at variance with all the adjudged cases in England and in this country—not only with the decisions of every court, but with the opinion of every judge of those courts. We are referred, in proof of this position, to the cases of *Priestly v. Fowler*, 3 M. & W. 1; *Hutchinson v. The York N. & B. Railway*, 5 Ex. 343, and *Wigmore v. Jay*, Ib. 354, decided by the English court of Exchequer; *Murray v. The South Carolina R. R. Co.*, 1 McMullen, 385, by the court of appeals *of that state; *Farwell v. The Boston & Worcester* [212 R. R. Co., 4 Met. 49; and *Hayes v. The Western R. R. Co.*, 3 Cush. 270, by the Supreme Court of Massachusetts; and *Coon v. The Utica and Syracuse R. R. Co.*, 1 Seld. 492, by the court of appeals in New York.

We entertain the highest respect for these courts, and their undivided opinions upon any question arising upon the principles of the common law, would cause us to hesitate long before we differed from them. But even upon such a question, we should be compelled to follow the dictates of our own understandings; and the more especially should we feel at perfect liberty to do so, when they did not profess to base their decisions upon any settled principle of law, but undertook to declare a new rule for their action. If such a rule did not seem to us consistent with the analogies of the law, and calculate to promote justice, we should feel bound to reject it. Upon this question, we find no occasion to depart from established principles. It lies upon those who deny the defendant in error the benefit of these principles, to show some good reason for the exclusion. We have carefully examined all these cases, and can find in none of them any such reason, or any denial of the principle upon which we base this decision. While we can not approve all that is said in some of them, no one of them has determined the question now before us. *Priestly v. Fowler* was decided in 1837, and is the first case to be found in the English books where the limitation of the liability of the master is even hinted at. The action was brought by a servant against his master, for the negligence of another servant in overloading a *van*, by which

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the plaintiff was injured. It was held the action could not be maintained. Chief Baron Abinger, in delivering the opinion, says: "There is no precedent for the action by a servant against a master. We are therefore to decide the question upon general principles; and in doing so we are at liberty to look at the consequences of a decision one way or the other." He accordingly looked at the consequences, with a view to the actual state of 213] *English society, and concluded they would carry him to an "alarming extent." After referring to several instances where the liability of the master would attach, he concludes that "the inconvenience, not to say absurdity of these consequences," afford a sufficient argument against the action.

It can admit of very little doubt that holding the relation of master and servant to exist between the buyer and seller of a coach or a harness (instances put by his lordship) would, indeed, be both inconvenient and absurd.

It is unnecessary to examine, at any length, the other cases decided in that court. Upon a similar state of facts they each follow and affirm the doctrine of *Priestly v. Fowler*.

As these cases were decided upon no settled principle of the common law, but upon general principles, with a view to consequences, I may be permitted to refer to the opinion of another court, equally learned and able, sitting in the same kingdom and subject to review, if I am not mistaken, in the same ultimate tribunal. In the case of *Dixon v. Ranken*, 1 Am. Railway Cases, 569, determined by the highest court in Scotland, as late as 1852, the doctrines of the English cases were repudiated, and an exactly contrary decision made. The lord justice clerk, after referring to the English decisions, proceeds to say: "The master's primary obligation in every contract of service, in which his workmen are employed in a hazardous and dangerous occupation, for his interest and profit, is to provide for and attend to the safety of the men. That is his first and leading obligation, paramount even to that of paying for their labor. This obligation includes the duty of furnishing good and sufficient machinery and apparatus, and of keeping the same in good condition, and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater his obligation to make up for its defects by the attention necessary to prevent such injury. In his obligation is included, as he can not do everything himself, the duty to have all acts by

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others whom he employs done properly and carefully in order to avoid risk. This obligation is not *less than the obligation [214 to provide for the safety of the lives of his servants by fit machinery. The other servants are employed by him to do acts which, of course, he can not do himself, but they are acting for him, and instead of himself, as in his hands. For their careful and cautious attention to duty, and for their want of vigilance, and for their neglect of precaution by which danger to life may be caused, he is just as much responsible as he would be for such misconduct on his own part if he were actually working or present. *And this particularly holds as to the person he intrusts with the direction and control over any of his workmen, and who represents him in such a matter.*" And he adds: "There have been many cases in Scotland, at all periods and during the last fifty years, a *very* large number which proceeded on this as a fixed principle of the law as to the contract of service."

Lord Cockburn, after stating that "the plea that the master is not liable, rests solely on the authority of two or three very recent decisions of English courts," says: "If this be the law of England I speak of it with all due respect. But it most certainly is not the law of Scotland. I defy any industry to produce a single decision, or dictum, or institutional indication, or any trace of any authority to this effect, or of this tendency, from the whole range of our law. If such an idea exists in our system, it has, as yet, lurked undetected. It has never been condemned, because it has never been stated." After alluding to the fact that the rule had been pressed upon the court, not only on account of the weight of English authority, but for its own inherent justice, he proceeds: "This last recommendation fails with me, because I think the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable to legal reason. I can conceive some reasonings for exempting the employer from liability altogether, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account, and *certainly are not understood, by our law, to come under [215 any engagement to take these risks on themselves."

Such is the diversity of opinion, not only as to the existence of the doctrine, but also as to its justice and propriety, found to obtain

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in two of the learned courts in Great Britain; both uncontrolled by any statutory regulation, or other consideration peculiar to the system of law administered by either; but each determining the obligation arising from a relation, founded upon contract, which must be the same in England and Scotland.

The case of *Murray v. The S. C. Railroad*, 1 McMullen, 385, was decided in 1841. The plaintiff was a fireman, and was injured by the carelessness of the engineer. A majority of the court held that he could not recover. Judges O'Neill and Gautt, and Chancellor Johnston dissented. They admit that the plaintiff took upon himself, as a consequence of his contract, all the ordinary risks of the employment, and that he could not claim for injuries, against which the ordinary prudence of his employers could not provide; but they insist that injuries from negligence do not belong to these ordinary risks; that the company was bound to carry him safely, while he was bound to serve them faithfully; and that neither party should be permitted to extend or abridge the contract. "That the master can not exact other services than those stipulated for; nor, by any indirection, subject the servant to any other than the ordinary perils incident to the employment; and that if he does, by any agency whatever, or by any means, whether of design or negligence, accumulate upon the servant, while in the performance of his duty, any dangers beyond those inherent in the service itself, they fall upon the latter, not as a servant (for his contract does not bind him to endure them), but as a man, and the law entitles him to redress."

The next case in order of time is that of *Farwell v. The Boston & Worcester R. R.*, 4 Met. 36. The plaintiff, an engineer on the 216] defendant's road, was injured by the negligence of a switch-tender. His right to recover against the company, was denied in a very ingenious opinion by C. J. Shaw; in which the general proposition is maintained, that a master who uses due diligence in the selection of competent servants, and furnishes them with suitable means to perform the service in which he employs them, is not liable for the carelessness of one resulting in injury to another, while both are engaged in the *same service*. Of judicial determinations, he was able to bring to his support only the cases of *Priestly v. Fowler*, and *Murray v. The S. C. Railroad*; and characterizing it "as in some measure a nice question," he says: "we would add a

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caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle."

That it was not intended, by this decision, to foreclose the question now before us, is evident from the later case of *Hayes v. The Western Railroad*, 3 Cush. 270, in which the negligence charged, was that of a brakeman, acting, as was claimed, *pro tempore*, as conductor; and it was argued, that although the company were not liable to a laborer, for the neglect of another laborer, yet they were answerable for the neglect of an officer, such as the conductor was. The court expressly declined expressing any opinion upon the soundness of this distinction, and held that it did not properly arise upon the facts of the case.

The case of *Coon v. The Syracuse and Utica R. R.*, 1 Seld. 492, was brought by a trackman, employed by the defendants to keep a certain portion of their road in order, who claimed to have been injured by the negligence of the managers of a train running upon the road. The court considered the case governed by the authorities to which I have referred, and especially the one from *Metcalf*, and gave judgment for the defendants. Judges Gardner and Foot only, expressed opinions. The former said the good sense of the principle, when applied to individuals engaged in the same service, was sufficiently obvious; but that there might be more doubt of its justice in reference to those whose employments are *distinct, [217 although both may be necessary to the successful result of a common enterprise. And the latter admits that it "has been unfolded and brought to view within the last twenty years, and principally by the new business commenced within that period, and now extensively prosecuted, of transporting persons and property by steam on railways."

I have now referred to every decision of a court of last resort, within my knowledge, bearing upon the question under consideration.

While the principle of *respondet superior* is as old as the law itself, it is everywhere admitted that no such exception to its operation as is now contended for, was ever asserted until the case of *Priestly v. Fowler* was decided.

That case, and those made upon its authority in England and America, have all proceeded upon the general ground of exempting the master from responsibility to one servant for injuries arising from the carelessness of another engaged in the common serv-

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ice, because the servant, by his contract, takes these risks upon himself. None of them have in terms declared that he is not liable for the negligent and careless conduct of him to whom he delegates the power of control and command over them. The court whose authority has been most relied on in this country, has expressly refused to declare it. Even to this extent the doctrine has been resolutely resisted at every step by distinguished jurists. To speak of it, therefore, as a settled principle of the common law, is to confound ideas. To adopt it without a conviction of its justice and propriety, is to abuse the power with which the law has invested us. Our plain duty is to endeavor to ascertain the true nature of the relation between the parties, and the inherent elements of the contract on which it is founded, and from *them* deduce the principle that ought to govern. For, as has been said by an elegant writer: "If law be a science, and really deserves so sublime a name, it must be founded on principle, and claim an exalted rank in the empire 218] of reason." And upon a question like this, *what is good sense at Westminster is good sense at Edinburgh, or wherever else parties may contract.

Tested in this manner, it seems to us clear, in a case like the present, that as between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise—the one resting upon the company, and the other upon the servants—and both founded upon what each, either expressly or impliedly, has agreed to do in execution of the contract. It is the duty of the company to furnish suitable machinery and apparatus, and, as they reserve the government and control of the train to themselves, and intrust no part of it to *these* servants, to control it and them, with prudence and care. As the necessity for this prudence and care is constant and continuing, the obligation is performed only when it is constantly exercised, and they can not rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge Story, they "in effect warrant his fidelity and good conduct."

It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they may do. In such case there is no failure of the company to do what, as

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between them and these servants, it was understood they should do, when the servants entered the service. But they can not be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences.

While one member of the court would extend the liability further than a majority of us think the principle upon which it is founded will warrant, we are all of opinion that there *was no error [219 in the instructions given by the court below to the jury, and that the judgment should be affirmed.

WARDEN, J. While I agree that this judgment should be affirmed, the ground on which I would place the right of the plaintiff below is so much broader than that taken by the majority of the court, that in view of the construction which will be given to their ruling, and what appear to me its consequences, I feel bound to state my qualified dissent, with the reasons that appear to support it.

Having been compelled to examine this question judicially, several years ago (*Stevens v. Little Miami Railroad Co.*, 7 W. L. Jour. 369, being the same case which came under examination in 20 Ohio, 415), I was led by its careful consideration to the undoubting conclusion that the maxim, *qui per alium facit, per seipsum facere videtur*, applies to cases of different servants employed by the same master, where one, by his nonfeasance or negligence, does an injury to the other. No decision that has since been made, nor any reasoning with which I have become acquainted, has satisfied me that in its application to facts like those now before us, the rule of liability on the part of a master for the negligence of his servant, was not then stated with substantial accuracy. And, while the respect due to learned judges in England, and in some of our sister states, as well as that I owe to my brethren in this court, commands me to express my dissent from the conclusion they have adopted with no more positiveness than results from my own calm, though it may be mistaken conviction, I shall be pardoned, I trust, for the confidence with which I state my own opinion of the true rule of law on this subject.

By the case of *Priestly v. Fowler*, 3 M. & W. 1, and the Amer-
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ican cases which have followed it, the maxim to which I have referred is so restricted as to deny the liability of a master, in any case, for the negligence of one of his servants whereby another sustained injury. This court, as I understand the effect of the decision just pronounced, *refuses so to qualify the rule, but does confine the liability of one who is the employer of several persons, for the negligence of one of his employes, whereby another is hurt, to cases in which he who was damaged was subordinate to the negligent agent or servant.

I have been unable to satisfy myself with either restriction. I think none such is made by law, or demanded by public policy.

That in England, a *menial* servant could not have an action against his master for the negligence of a fellow-servant, of the like state and condition with himself, does not strike me as a novel view of the law; though, so far as I know, it had never been taken before the days of Lord Abinger. The reasoning of that learned, but somewhat eccentric judge, does not, indeed, very strongly lead my mind toward any such conclusion; for his whole opinion is but one of the many instances of how little some of the most shining talents of the advocate appear to prepare their possessor for the office of the judge. But a view of the English legal and social system reveals some apparently valid reasons for denying a right of action by a domestic servant against his master for negligence, whether of the master or of another servant. Were such an action brought in an English court, there would be vividly present to the judge all the features of that division and subdivision of the English people into classes, which has survived every shock given to the constitution, and resisted every reform attempted in the state. From the highest of the degrees of nobility and honor derived from the king as their fountain, there is a long descent through the ranks of *dignity* and *worship*, and even through the condition and esteem of tradesmen, artificers, and laborers, down to that lowest estate held by the menial servant.

Putting aside, for the present, what suggestions of policy would arise out of the intimate, familiar character of the relationship between master and servant, I should not be astonished beyond measure to find that the contempt in *which the class of menial servants was anciently held, had so continued down to 1837, that even then the assertion of a claim by an individual of that class, founded on the negligence of his master, would have encoun-

tered some opposition from that reverence for rank, which must have entered into the constitution of any English tribunal whatever. Descendants of the *servi*, the *villeins*, and *born thralls*, who led the hard life of servitude throughout the governmental changes of ancient times in England, menial servants had a very poor estimation in legal regard. Their condition is treated of by Blackstone, in immediate connection with that of *slaves* and *villeins*. They were not left to their own volition as to serving or not serving. All single men, between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, were compellable, by two justices, to go out to service in husbandry or certain specific trades, for the promotion of honest industry. 1 Bla. 425, 426. The contract of hiring, where no limitation was expressed, was construed with reference to a supposed duty of the master, to protect his dependents throughout the changes of the year, whether there was work to be done or not. Ibid. No master could put away his servant, or servant leave his master, after being so retained, either before, or at the end of his term, without a quarter's warning, unless upon reasonable cause, to be allowed by a justice of the peace, although they might part by consent, or make a special bargain. Ibid. Such a servant had no clear right of action for a moderate correction by his master—in some instances, that exercise of authority was clearly lawful. The master could justify a battery in defense of his servant, and the servant the like in defense of his master. In these respects, and in the enforcement of strict obedience and outward reverence, the master almost stood *in loco parentis*. In a word, the menial servant was so far a member of the household, that Blackstone evidently looks upon his master as the *paterfamilias* even as to him. 1 Bla. 431. We begin now to appreciate the ludicrous *alarm of Lord Abinger, at what he supposes [222 to be some of the consequences of allowing a servant to sue his master for the negligence of a fellow-servant. We can discover whose interests he has in mind, and what is the source of his anxiety, when he says: "The master, for example, would be liable to the servant for the negligence of the chambermaid in putting him into a damp bed!" etc.

But there are better reasons for denying the right of action to a domestic servant in England, against the master, for the negligence of a fellow-servant. The state of such a servant is, in general, one

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of comparative comfort. Deeds of kindness and mercy, strong personal attachments, and a noble fidelity, have often illustrated the relationship of master and servant. Most favorably regarded, and leaving out of sight occasional cruelty and insolence, the relationship itself had strong points of resemblance to that of parent and child. The bringing of an action for negligence, by child against parent, or by the latter against the former, might not have appeared more unnatural than such an action by a domestic servant against his master, or *vice versa*; for the disability must have been mutual.

If, then, an English court should have found, that, from time immemorial, the lips of such a servant had been sealed against all complaint of his master's negligence, it might well have turned away from his claim for redress by his master, of a wrong resulting from the negligence of a fellow-servant. If the case of *Priestly v. Fowler* had been such a one, I should not have felt shocked at the judgment, whatever may be said of the reasoning in that case.

But it was no such matter. The plaintiff and his fellow were servants of the defendant, "in his trade of a butcher." Even if the declaration had averred that they dwelt with their master, having bed and board under his roof, that, I take it, would not have made them menial servants. "Residence *intra moenia*, i. e., within the curtilage or domain of the master," says Mr. Hargrave (1 Bla. 425, note), "constitutes gardeners, gate-keepers, and others, domestic *menial servants. But residence *intra moenia*, is not sufficient of itself to render every servant a domestic; thus, the clerk to an army clothier, though resident on the premises of his employer, is no domestic—nor is a warehouseman." All that can be said, is, that consistently with the declaration in *Priestly v. Fowler*, the plaintiff might or might not have been a menial servant. Lord Abinger makes no distinction between the different sorts of servants.

Yet there is, and always was, such a distinction. The whole history of *tradesmen* and *artificers*, for instance, forbids us to class them with menial servants, no matter what their place in the scale of employment, at least when they ceased to be *apprentices*. Like common laborers, whose state indeed was often, if not generally, even more wretched than that of menial servants, they may have been held in check by the contempt with which all labor was regarded. But men employed in the workshop of the mechanic, or in like occupations, had never been so stamped with the mark of inferiority as to lose the common rights of English subjects. And, however

hard the struggle they have made for a meliorated condition, I can not think that, in the year of our Lord 1837, the law of England recognized any rule of public policy as opposed to the maintenance of actions by such persons against their employers where strangers to the contract of employment, injured by the negligence of one of such employes, might have had their action. Not one of the reasons, which forbade such an action by a menial servant, has the least application to the case of such employe.

A passage in Blackstone's Commentaries appears to have been read by the learned Chief Justice Shaw (*Farwell v. Boston & Wor. R. R. Corporation*), as though it countenanced the doctrine in *Priestly v. Fowler*. After citing and commenting on the language referred to (1 Bla. 431), the chief justice says: "But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity." Surely, this is straining—unless, *indeed, all that is here meant is that there must be no [224] privity of contract between the negligent servant and him who sues the master; or, rather, that the plaintiff must not be privy to the contract of service between the negligent servant and his master. This is certainly all that Blackstone intended when, for illustration (not as a definition), he put the case of liability on the part of a master to a "stranger." And each of several persons, serving a common employer under distinct hirings, is a stranger to the contract of each and every other workman or servant under the same master or employer.

Enough has been said to show that there is nothing in the objection of Lord Abinger (followed in this by C. J. Shaw), that there is no precedent of such an action as that we are considering. The failure to find such a precedent in the books of English reports, is not astonishing. It is not improbable that the first attempt to make such a precedent was the very case before Lord Abinger. If a menial servant had brought such an action, he would probably have failed in any court. That no other employe ever ventured to make the attempt, can easily be accounted for, without denying his right. Menial servants being placed as I have shown in legal regard, other servants were subjected to some disabilities, in fact if not in law, from bearing the same name, and being, to some extent, in the same social estimation. They would not be very apt to stand on their strict rights, or very able to enforce a favorable hearing—to say nothing

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of the expensiveness of the legal luxury of an action in an English court.

We have, then, no good authority for holding the law to have been such as Lord Abinger declared it, unless his decision, and those which have treated it as a leading case, furnish that authority. This would date the doctrine as of the year 1837.

But we have, I think, good authority for denying that such is, or ever was, the law of Scotland—and the ancient laws of England 225] and Scotland were very like, in all matters of this *sort. My learned brother who delivers the majority opinion in this case, has cited the evidence that the Scotch rule is such as I have supposed.

The notion of Chief Justice Shaw that the contract of service includes an undertaking by the servant of all risks, whether of unavoidable accident or of damages arising from the negligence of other servants, is certainly an ingenious invention to fortify the case of *Priestly v. Fowler*. But the rate of compensation in dangerous employments, and the well-known motives of inclination or necessity which cause men to undertake them, are against such a supposition. No such agreement or understanding is ever had, or ought ever to be countenanced by the law. It would be so against reason and conscience as to be void.

Nor is the notion that to discountenance actions like these will lead to a watchfulness by every servant over the conduct of his fellows entitled to any higher regard. In the instance of an equal, such watchfulness would be fruitless unless it were accompanied by tale-bearing; and what an equal would disdain to do, an inferior would not dare to attempt—while no officer in command would submit to such conduct in an inferior. There would be an end of all confidence and all subordination alike.

If, then, in the language of Lord Abinger, we are at liberty to look at the consequences of a decision the one way or the other, I can not imagine any ill consequence of holding that where an action is brought against the employer for the negligence of one in his employ, the mere fact that the plaintiff was also in his employment, whether as an equal, a superior, or a subordinate, is not to turn him out of court.

Whether the distinction I have shown to exist in England between menial and other servants, ought to be taken in this country, it is unnecessary, perhaps, to inquire. It is certain that it can not here be made by any fixed legal rule of respect or degradation. It

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may be, however, that the same intimate, familiar relationship of master and servant here, as in England, forbids the action for negligence either way, as *between members of the same house- [226 hold. There may be no political reason or social necessity for departing from what would be a good rule in England on this subject.

And it ought to be admitted that since there are some employments in which large and uncontrollable masses of men engage, and for which no particular or careful selection can be made, the rule of the employer's liability for the negligence of those under him ought to be carefully confined to cases strictly within its reason. Nor ought light and trivial causes to find any countenance.

But, leaving room for the ascertainment of all necessary exceptions, I would certainly hold the employer to his common liability for the negligence of one into whose hands he has put the power of doing hurt, as well when the plaintiff was also in his employment as when the wrong was done to a stranger, and wholly without reference to the superiority, the equality, or the inferiority of the plaintiff, relatively to the negligent employe. I would not except the case of a conductor (for instance), because he happened to be in command. He is no more the representative or organ—in other words, the agent—of the railroad company than the *brakeman*, or any other subordinate. The conductor is an agent appointed to command; the brakeman is appointed to obey; but commandment and obedience are alike acts of agency. The fact of superiority or subordination in the position of the agents can, in my opinion, be important only in a case which shows the inferior to have sustained the hurt through his obedience to some order of the superior. But where the hurt is not a necessary consequence of the subordination, and is not otherwise connected with it than by the necessary presence of the inferior in his place, I see no peculiar warrant of recovery in the fact that the person negligent was in a place of command. I look upon every officer of the railroad company, no matter how high in trust, or low in responsibility, as its agent and nothing but its agent. None of them is the corporation; all of them are its representatives for some purpose, and to some *extent. The conductor of a railroad, for instance, [227 does not select his subordinates. He does not, in fact, agree to stand all the risks of their negligence; he merely agrees to be faithful himself in holding them to their respective duties. If he be faithful—if no negligence of his peculiar duty can be imputed to

him—I can find something much better than a precedent of an action by him against the company for the negligence of one under him in employment.

I find to support such a claim the broad and equitable principle—what a man does or neglects by another, he does or neglects himself. *Qui per alium facit, per seipsum facere videtur*, is a maxim of justice and humanity as well as law. It is as well founded in natural right as any other rule growing out of the social condition. It is no more the result of convenience than property itself. What we call public policy, may artificially extend or limit its application, according to times, places, and conditions; but almost every conceivable right or duty of social relation may be circumscribed in like manner and for like ends, the great right of property itself forming no exception to this truth. The right of one hurt to be made whole by him who caused the injury, whether through a merely mechanical means, or through a living, intelligent agency, which he set in motion, is as nearly absolute as any that distinctively belongs to a state of society.

In refusing to admit the exceptions to the operation of this rule, which certain courts have declared to exist, I am governed not a little by the notice I have taken of the difficulties and embarrassments into which the most learned and humane jurists have always fallen, in announcing this new canon of the law of agency.

The rule of law which protects the agent against an action by a stranger for mere negligence, want of skill, or nonfeasance (see Story on Agency, sec. 308), is not merely overlooked by the distinguished chief justice who established the precedent of the new rule in Massachusetts; but it is plainly intimated by the learned judge that the action should have been against the negligent agent. [228] This instance, and *that already given of the strained construction given by the chief justice to the words of Blackstone, show that the invention by Lord Abinger of all manner of forced illustrations to justify his decision, is not altogether inexplicable. To stand on the old law was easy; to make a new one was attended with the greatest trouble, and required the most artificial distinctions.

In the ruling of this court I also find, or imagine, several matters, which render it difficult to recognize the reason of the decision here made.

I can not see how this action would be helped, if we could con-

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sider the conductor as the visible representative or embodiment of the corporation itself. Every suggestion of policy forbidding the liability of an employer to one of his employees, for the negligence of another, is equally good against an action by such employe for the damages he may sustain through the negligence of the employer himself, if he undertake to do the duty of a conductor, a foreman, or the like. Just as large a risk ought to be taken in the one case as in the other. If the employer himself is a fit person for the work he undertakes, he can as well defend himself against an action for a particular instance of negligence on his own part, as against the like action for the particular negligence of one of his servants, whom he has selected on account of his general fidelity and fitness. If I am right in this—and I believe it will be found that I am—the observation of Judge Story, on the cases which have discountenanced such an action as the present, deserves more attention than it has generally received. He states the new doctrine so as clearly to imply a doubt of its soundness, and remarks: "In neither of these cases could there be the least doubt that the principal would have been liable, if the injury had been occasioned by his own personal negligence or omission of duty." Story on Agency, sec. 453c.

In any view I can take of this question, the right of the plaintiff must be as broad as I have stated. I disagree to the restriction of that right, because I believe that there can *be found to war- [229 rant such limitation, no rule of law, no maxim of any system of jurisprudence whatever, and no consideration of public policy. I think it is a novelty in the law, resting on a doubtful foundation of justice, and making a discord in the system into which it has been forced. On the other hand, a wise and salutary maxim seems to establish the right as I believe it to exist. And if that right has not been pronounced by the ancient oracles of the law, the common sense and common humanity of such as tempt men into hazardous employments, constantly recognize the answering duty, and establish precedents of its obligation none the less valuable because they do not enter into the books of reports.

ALPHEUS W. POAGE v. THE STATE OF OHIO.

An indorsement of a promissory note is the subject of forgery under the crimes act.

It is not always indispensable to the sufficiency of an indictment for a statutory offense, that it describe the offense in the precise words of the statute.

A boy under sixteen years of age, convicted of forgery in Hamilton county, and sentenced to confinement at hard labor in the House of Refuge, and to pay the costs of prosecution, is incompetent as a witness, so long as his sentence remains unreversed or otherwise unannulled.

Where a court, in a criminal case, after a jury have retired to consult on their verdict, discharges them without the assent of the prisoner, and without the existence of a cause for which they might lawfully be discharged, the prisoner can not be again tried for the same offense.

ERROR to the criminal court of Hamilton county; reserved in the district court.

The plaintiff in error was jointly indicted with Addison Kyle for the crime of forging an indorsement on a promissory note, by the grand jury of Hamilton county, at the February term, 1854, of the criminal court. A separate trial was granted to the plaintiff in error, on a showing for that purpose. Addison Kyle was tried, 230] convicted, and sentenced at *that term. The plaintiff in error was put on his trial at the same term, but after the jury were charged with the case, the court discharged them from its further consideration, and entered a continuance to the next term. At the April term, 1854, the plaintiff in error was again put upon his trial, and found guilty under the second count in the indictment, and not guilty under the first count. By his counsel, he thereupon moved the court for a new trial, and in arrest of judgment, because of the insufficiency of the indictment, because the verdict was against the evidence, and for various other reasons specifically; which motion, upon argument, was overruled. A writ of error was granted by the district court of Hamilton county, for good cause shown, at its April term, 1854; and the case being found to involve important and difficult questions, was reserved for decision in this court. There are four different errors assigned upon the record:

I. That the indictment on which the plaintiff in error was convicted is insufficient in law.

Poage v. The State.

The second count, on which alone the jury placed their verdict, is in these words :

" And the jurors aforesaid, on their oaths aforesaid, do further present that the said Addison Kyle and Alpheus Poage, otherwise called Alfred Poage, otherwise called Alf Poage, on the tenth day of January, in the year eighteen hundred and fifty-four, with force and arms, in the county aforesaid, had in their possession and custody, a certain other promissory note, which said last-mentioned promissory note is as follows, that is to say :

" \$82.95.

DRY RIDGE, KY., Jan. 6, 1854.

" "One day after date, I promise to pay to the order of George H. Calvert, eighty-two dollars 95-100 dollars, at the

Value received.

'F. F. NESBIT.'

They, the said Addison Kyle and Alpheus Poage, otherwise called, (etc.,) afterward to wit, on the day and year last aforesaid, at the county aforesaid, unlawfully, feloniously, did forge on the back of the said last-mentioned promissory note, a certain indorsement of the said promissory note, which said indorsement is as follows, that is to say, 'George H. Calvert,' with intent to defraud Fleming Faris Nesbit, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Ohio.

" A. J. PRUDEN, *Pros. Att'y.*"

*II. The second error assigned upon the record is, that [231 the court erred in allowing the witness, Addison Kyle, to be sworn and to testify. The ground of this assignment of error is set forth in the bill of exceptions No. 1, in these words :

" Be it remembered, that on the trial of this case at the April term, A. D. 1854, of the criminal court of Hamilton county, the State of Ohio to maintain the issue on its part, in the progress of the trial, offered as a witness in behalf of the state, the above-named Addison Kyle, who was jointly indicted in this case with the said defendant, Alpheus W. Poage; and when said witness was about to be sworn, the said defendant, Alpheus W. Poage, by his counsel, produced the records of this court showing the conviction of the said witness Kyle, at the February term, A. D. 1854, of this court, of the crime of forgery, and all other proceedings of this court, consequent thereupon, as shown by said records, a true copy and transcript whereof is hereunto attached, marked 'Exhibit A,' and made a part of this bill of exceptions. And thereupon the said defendant, by his counsel, objected to the said witness as incompetent to testify, on the following grounds :

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"1. Because the records of this court show that the said Addison Kyle stands convicted of the crime of forgery, and is now confined in the house of refuge, in Hamilton county, Ohio, therefor in pursuance of the order of this court, according to law, which order is not annulled or reversed.

"2. Because the said witness is the principal offender, and ought not to be allowed to testify against an alleged accomplice.

"3. Because the said witness, Addison Kyle, is a party to the record; all of which objections were overruled by the court, and the said Addison Kyle allowed by the court to be sworn, and to testify in the case, to which rulings of the court, and allowance of said witness to testify, the said defendant, by his counsel, excepted, and prayed the court to sign and seal a bill of exceptions, setting forth said several matters, which is accordingly done, this the twelfth day of April, A. D. 1854, at the April term of our said court.

"JACOB FLINN, *Judge*. [L. S.]"

The "Exhibit A," referred to, is a full record of the indictment, arraignment, trial, and conviction of the witness, Kyle, in the criminal court of Hamilton county, concluding as follows:

"The said defendant, being duly arraigned at the bar of said court, and inquired of, if he have anything to say why the court, now here, should not proceed to pronounce sentence upon him, nothing further saith, save as he before hath said. It is, therefore, considered by the court that the said defendant, Addison Kyle, be imprisoned in the penitentiary of this state, and kept at hard labor for the time of three years; that he pay the costs of this prosecution, and that the execution be awarded therefor.

"And now here, to wit, on the twenty-seventh day of February, in the term and year last aforesaid, came the prosecuting attorney, 232] on behalf of the *State of Ohio, and also came the said defendant, and on motion, and for good cause shown, the court ordered the entry made, on the twenty-third day of February, A. D. 1854, a former day of this term, on page 68, of the judgment and sentence of the court, on the verdict heretofore rendered in this case, be and the same is hereby set aside, and held for naught.

"And now here, to wit, on the twenty-seventh day of February, in the term and year last aforesaid, comes into court the prosecuting attorney, on behalf of the State of Ohio, and the said defendant, Addison Kyle, who was brought into court in custody of the sheriff of Hamilton county, and it being shown to the satisfaction of the court, that the said defendant, Addison Kyle, is under the age of sixteen years, having arrived at the age of fifteen on the seventh day of October, A. D. 1853; it is, therefore, considered and adjudged by the court that the said defendant, Addison Kyle, be confined in the house of refuge, within and for the county of

Hamilton, and State of Ohio, and kept at hard labor, under the control of the directors of said house of refuge, until he arrives at legal age, or is otherwise legally discharged; and that he pay the costs of this prosecution, and execution is awarded therefor."

III. The third assignment of error is, that the criminal court refused to allow the defendant (here plaintiff in error) to ask the witness, William G. Stephens, as to the general moral character and reputation of Addison Kyle, one of the witnesses for the state.

The bill of exceptions No. 2 shows that Stephens was called and sworn as a witness on behalf of the defendant below, to impeach the character of Kyle for truth and veracity; and that thereupon the defendant, by his counsel, put to him this question: "Are you acquainted with the general moral character and reputation of the witness, Addison Kyle, among his acquaintances and neighbors?" which the witness answered in the affirmative. The witness was then further asked by the defendant's counsel *to state what that moral character and reputation was*, but the court, on the motion of the prosecuting attorney, overruled the question as improper, and directed the inquiry to be confined to Kyle's *general character for truth and veracity*.

IV. The fourth error assigned upon the record is, that the court put the plaintiff in error upon trial a second time, after having, without his consent and without a sufficient reason, discharged the jury first impaneled and sworn to try his case, and thus placed him a second time in jeopardy.

*The part of the record referred to by this assignment is [233 as follows: "And the jury aforesaid, after hearing the testimony of witnesses, arguments of counsel, and charge of the court, retire under charge of the sheriff, to consult of their verdict; and, after the jury having retired, the court received the following note: 'Hon. Judge Flinn, we can not agree on our verdict; one of our jurors is not a naturalized citizen. We want your opinion to see if we can be discharged.' And the jury aforesaid being brought into court, court order said jurors be discharged from the further consideration of this cause."

Edmund Pendleton, for plaintiff in error.
Attorney-General, for the state.

THURMAN, C. J. We are of opinion that a forgery of an indorsement of a promissory note is within the meaning of the 22d

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section of the crimes act. Swan's Stat. (new ed.) 272. True, the words "indorsement of a promissory note" are not in the section; but it does provide against the forgery of any "bill of exchange," or "contract," "for the payment of money or other property," or "any order, or any warrant, or request, for the payment of money, or the delivery of goods and chattels of any kind," or "any transfer or assurance of money, stock, goods, chattels, or other property whatever," or "any power to receive money."

In *Aymar v. Shelden*, 10 Wend. 439, the court said: "No principle seems more fully settled or better understood in commercial law than that the contract of the indorser is a new and independent contract, and that the extent of his obligation is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill, the indorser being in almost every respect as a new drawer." Lord Ellenborough, in *Ballingalls v. Gloster*, 3 East, 481, and Lord Mansfield, in *Heylin v. Adamson*, 2 Burr. 674, said, expressly, that, as between indorser and indorsee, "every indorsement is a new bill." To the same effect are *Slocum v. Pomeroy*, 6 Cranch, 221, and *Story's Conflict of Laws*, 261. These 234] *authorities were considered and fully approved in *Case v. Heffner*, 10 Ohio, 180.

With these decisions before us it would, possibly, be admissible to say that an indorsement of a promissory note is embraced by the term "bill of exchange" in the forgery act. But if this be thought too large a construction to give to a criminal statute, it can hardly be gainsaid that such an indorsement is a "contract for the payment of money." It is none the less a contract that the liability is contingent. There is nothing in the statute that warrants the argument of counsel that the word "contract" is limited to unconditional promises.

It may also be considered "an order for the payment of money," and surely the sentence "any transfer or assurance of money, stocks, goods, chattels, or other property whatever," is comprehensive enough to include it.

The point that the indictment is defective because it does not employ the *precise words* of the statute, is countenanced by highly respectable authorities, but there is perhaps an equal weight of authority against it, and it is certainly opposed to the current of Ohio decisions. *Sutcliffe v. The State*, 18 Ohio, 469; *Sharp v. The State*, 19 Ohio, 379. All the elements necessary to constitute the 200

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crime must be averred ; in other words, the case must be clearly brought within the statute. To do this it is generally necessary to use the words of the statute. There is great danger in employing what are supposed to be convertible terms. Nevertheless, the *precise words* are not always indispensable. The rule was thus stated by Judge Hitchcock in *Lougee v. The State*, 11 Ohio, 69 : "The offense itself should be set forth with clearness and certainty ; and must be so described as to bring it *substantially* within the provisions of the statute."

In *Lamberton v. The State*, 11 Ohio, 282, an indictment which merely used the words of the statute was held, in that particular instance, to be too uncertain, because of the generality of its terms. The court thought that the *particular act* complained of, and which was included in the general *words of description in the [235] statute should be set forth ; and, in illustration of their views, said : "It (the indictment) is as general as would be an indictment for forgery, which followed merely the words of the statute without specifying any act constituting the crime, or an indictment for perjury, which only set forth that a party swore falsely, knowing to the contrary, without setting forth what matters he stated to be facts, and falsifying them."

Now, certainly, an indictment that simply charged a forgery of a "contract for the payment of money," without further description, would be bad. The forged instrument must be set forth "*in hæc verba*," that the court may see, by an inspection of the indictment, that it is an instrument which is the subject of forgery ; and where it is so set forth, and appears to be an indorsement of a promissory note, the indictment is none the less certain because the instrument is called by its specific name, *an indorsement*, than it would be if the more general description, "a contract for the payment of money," were used ; indeed, it is more certain.

In *United States v. Bachelder*, 2 Gall. 15, it was held, that in an indictment for a statutory offense, it is sufficient if the offense is substantially set forth, though not in the exact words of the statute. To the same effect are the reasoning and decisions of the court in the cases in 18 and 19 Ohio, above cited.

But while we can not say that the indictment is defective because it does not employ the *precise words* of the statute, yet, it must be admitted that in some other particulars, it is very loosely drawn ; and were it necessary to the decision of this case, to pass upon its

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deficiency, we would feel it to be our duty to give it further consideration. We think the court erred in permitting Kyle to testify. He had been convicted of the crime of forgery and sentenced, and his sentence had not been reversed or annulled. Had he been condemned to imprisonment in the penitentiary, it would not be pretended he was a competent witness. For the 41st section of the crimes act 236] provides, "that any *person sentenced to be punished for any crime specified in this act (when sentence shall not have been reversed or annulled), except under the 3d and 25th sections, shall be deemed incompetent to be an elector, juror, or witness, or to hold any office of honor, trust, or profit within this state, unless the said convict shall receive from the governor of this state a general pardon under his hand and the seal of the state; in which case, said convict shall be restored to all his civil rights and privileges."

The 3d and 25th sections relate to manslaughter and dueling.

But it seems to have been considered by the court, that as Kyle was not sentenced to imprisonment in the penitentiary, but only to confinement in the house of refuge, in Hamilton county, pursuant to the acts of assembly of February 8, 1847 (45 Ohio L. L. 113), and March 25, 1851 (49 Ohio L. L. 121), the above section of the crimes act was not applicable, inasmuch as it requires a sentence to *punishment*, in order to disqualify. It is true, that the confinement of a boy under sixteen years of age, in the house of refuge, is not called *punishment*, in the above-mentioned acts of 1847 and 1851, and there are expressions in them that tend to show that the omission to call it so was designed. Nevertheless, we are very clear that such confinement, when the result of a conviction, by jury, of crime, is to be regarded as punishment, and that it is none the less so because its principal object is the reformation of the offender. That is one of the objects of most punishments, in a civilized country, and whether it is a principal or a minor consideration, does not affect the question whether the sentence is to punishment or not. Confinement in the house of refuge, or subjection to the control of its directors, is a restraint of liberty, and when it is consequent upon a conviction and sentence for crime, it must, to be constitutional, be regarded as punishment. Const., art. 1, secs. 1, 6. But Kyle was not simply restrained of his liberty. He was not merely placed under the control of the directors as his guardians. He was con- 237] demned to *hard labor for over five years, unless sooner legally discharged, and to pay the costs of prosecution. Surely

this is punishment; surely it is a sentence that might be pleaded in bar of another prosecution for the same offense; and unless we are prepared to admit that the 41st section of the crimes act has no application except in cases where the very punishment prescribed in *that* act as inflicted, we must say that the witness was disqualified. But to make this admission would be to lose sight of the reason for the disqualification. It is not merely to punish the criminal, that he is rendered incompetent to testify. If that were the sole, or principal reason, the law would be eminently absurd. The true ground of exclusion is the infamy of the crime. A person capable of committing either of the offenses specified in the crimes act, manslaughter and dueling excepted, was deemed by the legislature wholly unworthy of credit. It was therefore thought politic to exclude him from the witness-stand. But he could not properly be called guilty before sentence. For the verdict might be defective, or however regular, might be contrary to the evidence, or unsupported by it, and for these, or other sufficient reasons, might be set aside. So, for good cause, the judgment might be arrested. Hence, it was proper to provide that the disqualification should not take place until sentence. Before then, it could not safely be said that the person was infamous.

These views are fully sustained by the authorities. *People v. Whipple*, 9 Cow. 708; 1 Arch. (Waterman's ed.) 155, note 1, and cases there cited.

It may be proper here to remark that, were the question fairly before us, it might be a subject of serious inquiry whether the sentence upon Kyle was not erroneous. It is certainly worthy of consideration whether forgery can be punished in one manner in Hamilton county, and in another, and much more degrading manner, in every other county in the state, under a constitution which declares that "all laws of a general nature shall have a uniform operation throughout the state." But it is unnecessary in this case to pass upon this question, and I only allude to it lest it might [238 be inferred from silence that we recognize the correctness of the sentence. If it were admitted that it is erroneous, we are not prepared to say it is void; and as it remained in full force when Kyle was offered as a witness, he was incompetent.

The fourth assignment of error is, "that the court put the plaintiff in error upon trial a second time, after having, without his consent, and without any sufficient reason, discharged the jury first impan-

eled and sworn to try his case, and thus placed him a second time in jeopardy."

By the record it appears that, at the February term, 1854, the prisoner, being arraigned, pleaded not guilty, and thereupon a jury was impaneled and sworn to try him, and the trial progressed. The record then proceeds as follows: "And the jury aforesaid, after hearing the testimony of witnesses, arguments of counsel, and charges of the court, retire under charge of the sheriff to consult of their verdict. And after the jury having retired, the court received the following note: 'Hon. Judge Flinn, we can not agree on our verdict. One of our jurors is not a naturalized citizen. We want your opinion to see if we can't be discharged.' And the jury aforesaid being brought into court, court ordered said jurors to be discharged from the further consideration of this cause." This is all that appears in the record in reference to the discharge of the jury. At a subsequent term, to which the cause was continued, the prisoner was again put on trial, convicted, and sentenced.

That a jury may be discharged by the court in a criminal case, where they can not agree, without its operating to acquit the accused, was expressly decided in *Henley's case*, 6 Ohio, 399, and we are not disposed to question that decision, supported as it is by numerous authorities, although decisions of an opposite character may be cited against it. Whether they can be discharged because it is discovered that one of them is not qualified, neither the state nor the prisoner objecting to him, is another question, upon which we find it unnecessary to express an opinion.

239] *That the power to discharge is a most responsible trust, and to be exercised with great care, is too obvious to require illustration. "It is a discretion," said Mr. Justice Story, "to be exercised only under very extraordinary and striking circumstances." 2 Gall. 364. "The power," said the same judge, "ought to be used with the greatest caution, under urgent circumstances, which would render it proper to interfere." *U. S. v. Perez*, 9 Wheat. 580. "I am of opinion," said Chief Justice Spencer, "that, although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of *extreme and absolute necessity*." *People v. Goodwin*, 18 Johns. 187.

That the discretion is a "legal discretion, and to be exercised according to known rules," was expressly held in *McKee's case*, 1 Bailey, 651, recognized in *Mount v. The State*, 14 Ohio, 304.

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That it ought to be exercised in cases of mere disagreement only after a long effort of the jury to agree, and when there is no reasonable hope of their doing so, is well settled.

That the reasons for the discharge ought to appear in the record seems to be generally supposed, since we find them thus stated in all the reported cases we have examined. But, in the present case, it is unnecessary for us to say what we would do were the record silent as to reasons. Such a case would present the question, whether a court of errors ought not to presume the existence of sufficient reasons? Here, however, we have the reason stated, and there is, consequently, no room for presumptions. We are, then, to decide upon the facts as they appear, whether the case was one in which the court could, in the exercise of a legal discretion, discharge the jury. If we find it was not; if we find that no case arose for the exercise of discretion, it will be unnecessary to inquire whether we have any power to review the exercise of a legal discretion.

Now, for what reason were the jury discharged. Because they could not agree? The record does not say so. Because one of them was unqualified? No such fact was found by the court. [240] The only reason was that the judge received a note from some one, it does not appear whom, saying that the jury could not agree, and that one of them, whose name is not given, was not a naturalized citizen. They were thereupon brought into court, and without any inquiry being made whether they had agreed or could agree, or whether any one of them lacked the necessary qualifications, and without any statement whatever by them to the court, they were discharged. It was not even ascertained that the note was sent by them, or by any one of them; and, so far as appears, such may not have been the fact. It was not ascertained that either of them was unqualified, and the presumption therefore is that they were qualified. It does not appear that they deliberated long, or that there was any good reason to believe they were unable to agree. No assent to their discharge was given by the prisoner, nor is it shown that he was even cognizant of the cause of their dismissal. In a word, the only grounds for the discharge, that are found in the record, are the unverified statements of an anonymous note.

Now, it does seem to us, that this was no case for the exercise of that "delicate and highly important trust," that only exists "in cases of extreme and absolute necessity;" and that were we to

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sanction what was here done, it would allow to a judge an absolute and uncontrollable, instead of a legal discretion.

We are therefore unanimously of opinion, that the discharge of the jury was, under the circumstance, unauthorized by law, and it only remains to be considered whether the prisoner could afterward be again tried, consistently with the provision in the constitution, that no person shall "be twice put in jeopardy for the same offense." Art. 1., sec. 10. There are decisions entitled to great respect, that a prisoner is not put in jeopardy, unless a verdict has been rendered in his case. But the weight of authority, we think, is otherwise, and we consider the law as settled in this state by Mount's 241] case, already cited. It was held in that case that *after a jury is impaneled and sworn, if a nolle prosequi be entered by the prosecuting attorney, with leave of the court, and without consent of the prisoner, and the jury be discharged without rendering a verdict, it is a good bar to another indictment for the same offense. And in Henley's case, 6 Ohio, 402, in which the jury were discharged because they could not agree, the court said that if the power to discharge did not exist, "the court were clearly in error in putting the plaintiff in error a second time on his trial on this indictment, for no rule is better settled than that which prohibits putting a person twice in jeopardy for the same crime; and our constitution is nothing more than the common-law principle on that subject,"

Let an entry be made reversing the judgment of the criminal court, and discharging the prisoner.

GEORGE W. BERRY v. WILLIAM WISDOM.

When a note is given by A to B, by which A promises to pay to B a sum of money, upon full proof of a breach of covenant entered into on the same day by A with B, and the agreement containing the covenant refers to the note, the agreement and note, though on different pieces of paper, are to be considered as but one agreement.

Where the note is to be paid upon full proof of a breach of the agreement, on the part of A, and the agreement contains several covenants to be performed by A, some of more, and some of less importance than others, and

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the actual amount of damages which B would sustain by a breach of some of the covenants, would be easily ascertained, the sum mentioned in the note is not to be considered as liquidated damages, but in the nature of a penalty.

ERROR to the common pleas of Cuyahoga county; reserved in Cuyahoga county.

The facts and questions are sufficiently stated in the opinion of this court.

Bolton, Kelley & Griswold, for plaintiff in error.

Hitchcock, Wilson & Wade, for defendant in error.

*KENNON, J. The parties entered into the agreement declared on, as follows: [242

“CLEVELAND, March 8, 1847.

“Know all men by these presents, That I, G. W. Berry, of the city of Cleveland, do hereby bind myself to give my entire services to W. Wisdom, upholsterer, of the city of Cleveland, for the term of three years from the date of this instrument; and I further pledge myself to consider all communications made to me, appertaining to the business department, as strictly confidential; and further, to use my best exertions and abilities, for the interest and welfare of the said Wisdom; and it is distinctly understood that I enter into this agreement as an apprentice, and will use all effort to benefit by all, every, and singular instructions given me by the said W. Wisdom and his foreman; and whereas, I have this day executed a note for two hundred dollars, that note shall become due and payable to W. Wisdom, on full proof a breach of this contract.”

This contract is signed and sealed by Berry and Wisdom.

The note is as follows:

“\$200.

CLEVELAND, March 8, 1847.

“At any time within three years from date, I promise to pay W. Wisdom, the sum of two hundred dollars, on full proof of a breach of the contract entered into with the said W. Wisdom, this day.

“GEORGE W. BERRY.”

Wisdom declared in debt, reciting the substance of the agreement and note.

On the trial of the case, Wisdom gave in evidence these two instruments of writing, and some evidence that the services of Berry were of some value, without showing of how much value, and that

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Berry left his service three months after the agreement. No other evidence was offered on either side.

Berry asked the court to charge the jury that the note offered in evidence was in the nature of a penalty, and not *liquidated damages*.

This charge the court refused to give, but, on the contrary, charged that if the jury found there was any breach of the covenant on the part of Berry, they should consider the note as *liquidated damages*, and find a verdict for the \$200, and interest from the time of the breach.

The jury found a verdict in accordance with the instruction, upon which judgment was entered for Wisdom.

243] *To the opinion of the court upon this point, the defendant, Berry, excepted, and the only question is, whether the court erred in this instruction.

The note and agreement are on separate pieces of paper, dated at the same time and place, and each refers to the other.

By the agreement, Berry bound himself to do several things:

1. To give his *entire services* to Wisdom, for the term of three years.
2. To consider all communications made to him, relating to the business department, as *strictly confidential*.
3. To use his best exertions and abilities for the interest and welfare of Wisdom.
4. That, as Berry was understood to enter into the agreement as an apprentice, he would use all and every effort to benefit, by all and every instruction given to him by Wisdom or his foreman.
5. That Berry would pay the amount of the note of \$200 within three years, upon full proof of a breach of the contract.

The real question is, what did the parties *intend* by this contract? Did they intend that for *any* and all breaches of this contract, Berry should pay \$200, neither more nor less? Did they intend that if Berry violated the contract, in communicating any matter relating to the business department of Wisdom as an upholsterer; or if he should fail, in *any* instance, to use his *best exertions* and abilities for the interest and welfare of Wisdom; or if he should violate his contract by not working for Wisdom the last week of the three years, or any other week, or day, he should forfeit and pay the sum of \$200, although it might be shown by evidence that Wisdom could not have sustained damage to a greater amount than ten dollars?

Did they intend that the *same* damages should be given for a violation of the most unimportant and the most important covenants in the agreement? Two hundred dollars for the loss of three days' *work, and the same sum for the loss of three years' [244 service? Before a court would put such a construction on a contract, it must appear *clearly* to have been the *intention* of the parties themselves.

Some general rules have been laid down by courts, as rules of construction, for the purpose of ascertaining the intention of the parties to such instruments, although the decided *cases* do not aid the court much in coming to a correct conclusion on the subject, for the reason that no two contracts are found to be precisely alike. The decision of each case depends upon its own peculiar circumstances.

In *all* cases, however, where the contract is for the payment of money, and the *liquidated damages* or penalty is greater than the sum secured to be paid, the court will hold the supposed *liquidated damages* to be a mere penalty to secure the payment of the lesser sum of money. Such cases, however, generally, but not *always*, are placed upon the ground of an unlawful attempt to recover usurious interest.

Where there has been a partial performance of the contract, on the part of the defendant, courts incline to put such a construction on the contract as to give to the plaintiff no more than the *actual* damages which he may have sustained by a breach of the contract. Indeed, if courts were to hold that the stipulated damages were actually *liquidated* by the parties, still, if the party defendant had performed nearly all his covenants, justice would require that there should be an abatement in the amount of the liquidated damages, in proportion to the benefit received by the plaintiff in the part performance, and some courts have required the abatement to be made.

When the agreement is for the performance of several things, and a gross sum is made payable upon a breach of the contract, and some of the things to be performed are of less importance than others, and the damages sustained could be easily ascertained, the presumption would be that the gross sum was not intended to be liquidated damages.

*Chitty on Contracts, 894 (9 Am. ed.), lays down the rule [245 thus:

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"When articles contain covenants for *several things*, and then one large sum is stated at the end to be paid upon breach of the performance, that must be considered a penalty."

This rule seems to embrace the principle upon which many decisions have been made. The case of *Kemble v. Farren*, found in 6 Bingham, 141, is a leading case on this subject. The case was this: By an agreement between the plaintiff and defendant, the defendant agreed to act as principal comedian at Covent Garden theater, for four seasons, commencing in 1828, and in all things to comply with the regulations of the theater. The plaintiff agreed to pay the defendant about £4 every night the theater should be open the ensuing four seasons, and that the defendant should be allowed one benefit each season. And the agreement contained this clause: That if either party should fail to fulfill the agreement, or *any part thereof, or any stipulation therein*, such party should pay to the other the sum of £1,000, to which sum it was agreed that the damages sustained by such failure should amount, as *liquidated damages*, and *not a penalty*, or in the *nature of penalty*. The breach assigned was, that the defendant refused to act during the second season. The court held that the £1,000 were not liquidated damages, notwithstanding the strong language of the agreement.

If we look *only* to the language of the contract, a stronger case for liquidated damages would be hard to find; but if, under the above rule, we look also to the subject-matter of the contract, and the nature of the covenants to be performed, it would seem almost impossible that the parties could have *intended* that, for *any* breach the £1,000 should be paid.

In the case of *Lange v. Werk*, 2 Ohio St., this court cite and *approve* of the decision in 6 Bingham.

In this case, the defendant had in part performed his contract; he had served the plaintiff three months. There are several cove-
246] nants in the agreement, the performance of *some of which must be of less importance to the plaintiff than others, and the damages for a breach of which could be easily ascertained; such, for instance, as the non-performance of labor for a few days.

We think that it is not only not *clear* that the parties intended that Berry should pay \$200 for the loss of a few days' labor, and should only pay that sum for a violation of any contract in his agreement, although Wisdom might have sustained much larger damages, but, on the contrary, it is rather a clear proposition that

they never could have intended any such thing; and we feel fully satisfied, by the nature and language of the contract itself, in holding that the parties intended the gross sum of \$200 to be a penalty only, and *not* liquidated damages, to be recovered for *any* breach of the contract on the part of Berry. I have no doubt myself that Wisdom might have sustained an action of covenant on the agreement, and might have recovered a much larger sum than \$200, if he could have proved damages to a larger amount, notwithstanding the agreement to pay the gross sum of \$200. We think the court erred in giving the charge that this gross sum must be considered as liquidated damages.

The judgment is reversed.

GEORGE N. WEBB v. JOHN H. BROWN ET AL.

A conveyance, by a fraudulent vendee of goods, in payment or security of the vendor's debt, requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property.

No just preference of creditors can be thus defeated, since, in every case in which the claim of the creditor is fair, the law would reward the greater vigilance of the creditor, and deny to any other creditor a preference resting in the favor or fraud of the vendor himself.

Nor can the vendee suffer by allowing such a right in his vendee; for, if the consideration remain unpaid, he can well question the amount paid by the vendee, if the whole fraud has been removed, on his own part; and if the consideration be wholly paid, the vendee would pay at his own immediate expense, and his own ultimate peril.

*PETITION in error, filed in this court, asking the reversal [247 of a judgment of the district court of Stark county.

This was an action on the case, tried by a jury in the district court of Stark county, at the May term, 1853. The plaintiffs, to support their action, proved that on the 14th day of July, 1848, one Alexander Garnier, was indebted to them in the sum of \$3,000, and upward, for goods sold to him about March 1, 1848; that Garnier had been doing business as a merchant in Canton; but that about one week previous to July 14, 1848, he had absconded. On the 23d day of June, 1848, Garnier had transferred his stock of goods, worth between \$7,000 and \$8,000, to one Nicholas Bour, who

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took possession. On the 14th July above mentioned, George V. Deitrick, an agent of the plaintiffs, called upon Bour, and demanded of him payment of their debt against Garnier. An arrangement was made, by which the claim of the plaintiffs was assigned to Bour, and Bour executed to them his four notes for the amount, payable in six, twelve, eighteen, and twenty-four months. To secure the payment of these notes, Bour also executed to the plaintiffs, a mortgage upon the goods transferred to him by Garnier.

The plaintiffs also gave evidence tending to prove that by their agent and attorneys they took possession of the goods by virtue of the mortgage from Bour; and that while so in possession, the defendants took possession and sold the goods. The plaintiffs proved the filing of the mortgage with the county recorder, whose office was in the township where the goods were situate. After the time when they claimed that they had taken possession under the mortgage, Garnier sent to their agent, Deitrick, the following order :

"*Mr. N. Bour* : Please pay to John H. Brown & Co., or order, three thousand and twenty-eight dollars and thirty-three cents, out of your store, in merchandise, at prime cost, and charge to account of, yours truly,

"Attest: J. H. CROWN.

A. GARNIER."

This order was presented by Deitrick, verbally accepted by Bour, 248] and evidence was given tending to show that *it was procured by an agent of the plaintiffs, for the purpose of aiding the arrangement, which had, without Garnier's knowledge, been previously effected between Deitrick and Bour. But there was no proof of any change in the possession of the goods after the reception of the order. It was accepted by Bour several days before the defendants seized the goods.

The defendant then proved that at the July term, 1848, of the court of common pleas of Summit county, Walter F. Stone obtained judgment against Garnier on a debt which existed prior to the transfer of the goods by Garnier to Bour, for \$3,330, on which an execution was issued on the 22d July, to the sheriff of Stark county. On the 24th of that month, the execution was placed in the hands of defendant, then sheriff of Stark county, by virtue of which he levied upon and took possession of the goods, as complained of by the plaintiffs. The defendant also gave evidence tending to prove that the transfer by Garnier to Bour, was for the purpose

of defrauding the creditors of the former, not for the purpose of preferring any of them, and that Deitrick, when he took the chattel mortgage, had knowledge of the facts constituting the fraud. Further evidence was given tending to prove that the plaintiffs had not, in any manner, taken possession under the mortgage, but that the goods continued in Bour's possession, and subject to his control, until they were levied upon by the defendant as above stated.

Upon these facts, after argument by counsel, the court (by Thurman, J.) charged the jury as follows :

"It seems to be admitted on both sides, that on June 23, 1848, Garnier owned the goods in question; that on that day he sold and transferred them to Bour; that Bour, on July 14, 1848, mortgaged them to the plaintiffs; that the mortgage (which you have in evidence) was duly filed with the recorder of Stark county on the same day; that afterward, to wit, on July 24, 1848, the defendant seized the goods by virtue of an execution against Garnier, and upon said execution subsequently sold them; and that the plaintiffs' claim *remains unpaid. Upon this state of facts [249 it is conceded, that the plaintiffs are entitled to recover, unless there is some defect in their title to the goods that invalidates it. It is contended that there are several such defects. It is said that the sale by Garnier to Bour was made to defraud Garnier's creditors, in which design Bour participated; that, therefore, Bour acquired no title to the goods, as against such creditors, and that consequently he could convey no title to the plaintiffs, who had notice of the fraud. It is true, as a general rule, that a sale made to defraud creditors is void as against the creditors, but as between the vendor and vendee, it is valid; and a good title may be acquired in certain cases from the vendee. Thus, a *bona fide* purchaser from the vendee, who pays a valuable consideration, and has no notice of the fraud, acquires a good title. So, when the fraudulent vendee transfers the property upon and for the sole consideration and purpose of paying or securing a debt of the fraudulent vendor, which existed at the time the fraudulent sale was made, the creditor taking such transfer, or mortgage, with no other intent than to obtain payment of, or security for his debt, acquires a good title although he had knowledge that the original sale was made to defraud creditors. If the transfer of the property to the creditor is absolute, in payment of his claim, the value of the property trans-

ferred ought not materially to exceed the amount of the claim; but when there is no fraudulent intent, it is no objection to the validity of the mortgage, that the mortgaged property is of more value than the amount of the mortgage debt. When this case was before the Supreme Court upon error (20 Ohio, 389), the court held that the mortgage in question was not invalidated by the fact that the plaintiffs, when they took it, had notice that the sale by Garnier to Bour was fraudulent. It was argued by counsel that that decision was placed upon the ground that Garnier assented to the mortgage; and it is contended that you have not sufficient evidence before you to warrant you in saying that he did assent, and 250] that, therefore, that decision does not *support the plaintiffs' case upon the proofs now made. It is true that the court in that decision lay some stress upon Garnier's supposed assent to the mortgage, but we do not think the decision rests upon that ground alone; we think it goes to the full length to which we have gone, in stating the law to you, and that, therefore, it is not essential to the validity of the mortgage, that it should be proved that Garnier assented to it. Our statute of frauds and perjuries (Swan's Stat. 422, sec. 2), provides, that every conveyance, made or obtained with intent to defraud creditors of their just and lawful debts or damages, shall be deemed utterly void; that is to say, such conveyance is void as against the creditors of the grantor, but is good as between the parties. By another statute (Swan's Stat. 717, 68), it is provided that all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure to the benefit of all the creditors in proportion to their respective demands. If such an assignment is made, whether fraudulently or innocently, a trust is created by operation of the statute, for the benefit of all the creditors of the assignor. But it is essential that the assignment be made with intent to prefer some creditor, for if that is not its object or scope, it does not inure to the benefit of all the creditors. The only assignments controlled by the statute (Swan, 717), are those designed to create preferences. But when a conveyance is not designed or framed to prefer a creditor or creditors, but is made or obtained to defraud all the grantor's creditors (as is said to be the case with the transfer from Garnier to Bour), it does not inure to the benefit of all the creditors of the grantor. It is not within the

statute, last above mentioned, but falls under the statute of frauds and perjuries first named, and is absolutely void as against the creditors of the grantor. But as no trust is created for their equal benefit, the diligent creditor may acquire priority over him who is not diligent. If he cause an execution to be levied on the property, he *acquires priority over him who levies afterward. [251 If the case is a proper one for a creditor's bill, he who files such a bill to reach the property obtains priority over him who comes later; as then the law will compel the fraudulent grantee to give up the property to satisfy the claim of the most diligent creditor, there seems to be no sufficient reason why the grantee may not do so without compelling the creditor to resort to legal proceedings. The debtor himself, if he had not transferred his property, might have used it to pay any of his creditors absolutely, or to secure payments to any of them, where the transaction was *bona fide*, and the sole object to give security.

"Why, then, may not the grantee do what the grantor could have done, and what he (the grantee) might be compelled by law to do, namely, subject the property to the satisfaction of the most vigilant creditor? We see no good reason why he may not. At least we think that the case in 20 Ohio, 389, requires us to hold that he may. We therefore instruct you that if the transfer from Garnier to Bour was such an one as we have supposed, it was nevertheless competent for Bour to mortgage the property to the plaintiffs to secure the debt due by Garnier to the plaintiffs; and that such a mortgage is not invalidated by the fact that the plaintiffs knew when they took it that the sale by Garnier to Bour was fraudulent. Nor is it invalidated by the fact that Bour took an assignment of the plaintiffs' claim on Garnier and gave his own notes for the amount of it, and that the mortgage is to secure the payment of these notes. As we have before said, Bour might have properly paid the plaintiffs' claim out of the property. And if he could thus pay it absolutely, it was competent for him to secure its payment by a mortgage upon the property. And if he gave such a mortgage, it is not defeated by the fact that he gave his own notes for the amount of the claim, and that the mortgage is drawn to secure those notes. The material inquiry is, does the property go to satisfy the claim of Garnier's creditors? If that is the substance of the arrangement, *its form does not invalidate it. It is next [252 objected that the mortgage to the plaintiffs is void, because it is said

that by the instrument the mortgagor retained a power of disposition over the mortgaged property, and we are referred to the case of *Collins v. Myers*, 16 Ohio, 547, as sustaining this objection, and also to the case of the present parties in 20 Ohio, both which cases show, as counsel contend, that the mortgage in question is void, for the reason aforesaid, unless the possession has been taken under it by the mortgagee. It is true that this position derives some support from the syllabus of the case, but there is not one word that sustains it in the opinion of the court. Nor, in our judgment, does the case in 16 Ohio sustain it. There is a material distinction between the mortgage under consideration in that case and that now in question. The former was held by the court to give to the mortgagor a right to retain the property, and to dispose of it as he saw fit. He was under no obligation to dispose of it for the benefit of the mortgagee, or to satisfy any claim meant to be secured by the mortgage. Hence the instrument was held to be void. But in the mortgage now before us, there is no such unlimited power of disposition. On the contrary, the power of Bour to sell is a power to retail in order to realize funds to meet and satisfy the mortgage notes. And over the exercise of this power the mortgagees are vested with a superintendency and supervisory control. The provision in the mortgage is as follows:

"Provided further, and it is hereby expressly agreed, that said Nicholas Bour be authorized to retail said stock of goods and merchandise in order to realize funds to meet and satisfy said several notes, the said John H. Brown & Co. retaining the privilege, however, either through themselves or their attorneys, Brown and Meyer, at any time they deem the safety of their claim may require it, to take possession of said stock of goods and merchandise, and so sell the same, or part thereof, as may be necessary to satisfy their claim aforesaid, and also to superintend or have the supervisory control of the sale of said goods by retail by the said Nicholas Bour, and to keep an account thereof, or hold the said Nicholas Bour to such a regular account thereof."

"We do not think that this provision renders the mortgage void, 253] or that it was necessary for the mortgagees to take *possession under it in order to give it validity. The mortgage, it is admitted, was duly and properly filed with the county recorder. We do not think that it was necessary, in addition to this, that the mort-

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gagees should take possession of the goods in order to give effect to their mortgage. And so we instruct you."

Verdict having been rendered for the plaintiffs, the defendant moved for a new trial. This motion was overruled, and the defendant thereupon excepted to the whole charge of the court upon the law of the case.

R. P. Spalding and M. Birchard, for plaintiff in error.

Mason, Brown, Leiter, and Myers, for defendants in error.

WARDEN, J. No member of the court is disposed to question the ruling in 20 Ohio, on the facts as they then stood before the court in this same case. Our predecessors held that the joint agreement of Garnier and Bour with one of Garnier's creditors might give such creditor a valid security without resort to legal process; and when some words used by Caldwell J. (beginning at the last paragraph on p. 399 of 20 Ohio), are compared with the second division of the syllabus (20, 389), it will appear that, as remarked by the district court, the late court in bank laid "some stress upon Garnier's supposed assent to the mortgage." And in such a case as the testimony then disclosed, and even upon the other facts, as they now appear, some stress might well be laid on such a fact, if it existed; not, however, as a thing essential to the soundness, or in other words the *operativeness*, of the mortgage, but as additional evidence of its good faith. When regarded, however, as connected with or entering into the conveyance itself, it seems to the majority of this court a thing of the slightest possible significance, and we are unable to assign to it any important relation to the transaction, or legal effect in its consummation.

What powers, for lawful purposes, are given to a fraudulent vendee over the goods sold to him? The "null and void" conveyance is, notwithstanding the strong words of the statute, [254 such only in some respects and for some purposes. We shall see that, after all, the limits which any sale (however fraudulent as to third persons) is absolutely null and void, are somewhat confined; and that such a sale may, even as to such third persons, leave substantial powers, for lawful purposes, in the hands of the vendee.

It is claimed that the vendor can not be heard if he attempt, for his own benefit, in any manner or degree, to deny his sale. As to his rights or interests, the law seals his lips against all question of

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the sale he has fraudulently made. Before our statute, his very administrator, representing, as he does, creditors as well as heirs, could not have justified a seizure of the goods from the vendee, but would have been compelled to give them up, or pay their value to the vendee, as he should bring his action. To this point may be cited *Osborn v. Moss*, 7 Johns. 161. In that case the defendant justified, as administrator of Hodges, the taking of a pair of oxen and two cows which were, as he said, fraudulently obtained by the plaintiff under a judgment, execution, and sale, produced and procured by covin and fraud between the plaintiff and Hodges, to cheat the creditors of the intestate; and this fact was admitted by demurrer. The court said: "The case of *Hawes v. Leader* (Cro. Jac. 270, Yelv. 196) is an answer to this defense, and completely destroys it. In that case, the intestate made a grant of his goods to B, by fraud between him and B, to cheat the creditors, and he kept possession of the goods and died. B then sued the administrator for the goods, and he pleaded this covin and fraud, and the statute of 13 Eliz., which declares all such gifts and grants void as against creditors; but, on demurrer, the plea was held bad, and judgment was rendered for the plaintiff on the ground, among others, that the deed was void only as against creditors, but that it remained good as against the party himself, and his executors and administrators. This ground of the decision is mentioned by Yelverton in his report of the case with *quod nota*; and he was counsel for defendant, and his reports are among the best of the 255] old authorities." The *court continued: "The defendant further sets up in his defense that he was a creditor as well as administrator of the intestate. It does not, however, alter the case. As creditor, he had no right to take the goods without suit. He was still a trespasser, and in his character of administrator he could not attack the judgment on the ground of fraud. His remedy, as creditor, would have been to have sued the plaintiff for his debt, and charged him as executor *de son tort*."

The administrator may, under our law, impeach the fraudulent sale of his intestate; but the vendor himself is, and ought to be, as much incapacitated as ever to set aside his sale, as between him and his vendee. As, however, his administrator, to save the right of creditors, may avoid his fraudulent sale, it may be contended, that the vendor in his lifetime, should have the same power. But to allow it, would open the door to fraud, and reverse the rule of

policy which does, and ought to prevail in this respect. The creditor may well, directly, or through an administrator, who is to that extent, his agent or representative, be allowed rights which the conveyance of the vendor should *estop* the latter from asserting. And, with all possible respect for the holders of an opposite opinion, it does appear to us, that the addition to the *legal power* of the vendee to convey as he pleases his own property, which would be furnished by the particular assent of the vendor, is too insubstantial, too shadowy, to be regarded for a moment. As between fraudulent vendor and fraudulent vendee, the *power* of the vendee to convey needs no recognition or addition whatever; and his right to do so in favor of a *bona fide* creditor, would seem, as between all parties to the transaction, to be wholly unquestionable. In every such case, the only material question would seem to relate to the reality and good faith of the debt paid or secured; and, as already intimated, "some stress" might well be laid upon the assent of the fraudulent vendor, as showing the good faith of the conveyance, and the justice of the creditor's claim.

*It is said, however, that the creditor having notice of the [256] fraudulent character of the vendee's title, stands on no higher ground than any other purchaser with notice; and the case of *Ashmead v. Heard*, 13 Penn St. 584, is relied on. Rightly understood, however, the doctrine of that case is merely that a preference of one creditor, made with the very purpose, known to the creditor, of defeating the claim of another, would be void, notwithstanding a full consideration were paid. This doctrine is too reasonable to be doubted. If Brown & Co. had any such purpose, or shared in it, their mortgage must fail.

And this brings us to the question whether, admitting the power of the fraudulent vendee to make such a mortgage as this, so far as vendor, vendee, and mortgagee are concerned, it can still be fairly contended that the rights of other creditors forbid such an arrangement?

In endeavoring to ascertain what rights other creditors might have acquired from the fraudulent vendor himself, should he repent of his fraud, much light may be taken from *Owen v. Dixon*, 17 Conn. 492. A sale, fraudulent as to creditors, had been made by J. to W., and the property had been held by W, while he lived, and his executor named it in the inventory, and held it in possession, when a creditor attached it, as J.'s property, and it was delivered

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to the creditor. Shortly afterward, the defendant, without authority from the vendee's executor, but by written authority of J., the fraudulent vendor and the debtor, sold the property. The executor of W. brought trover, and the court sustained the action. However fraudulent, the conveyance of J. was held to estop him, and all acting by his authority, or as his agents, whether creditors or not, from disputing the validity of the sale to W. The language of the court deserves attention, and though the whole decision can not be cited here, the following ought to have room :

"It appears, however, that the defendant was a creditor of Johnson ; and the next question is, whether he was protected against 157] this action, on that ground ? It is a familiar *principle that a fraudulent conveyance of property is void, as to the creditors of the vendor. By this is meant, that the rights of a creditor, as such, are not, with respect to the property, affected by such conveyance ; but that he may, notwithstanding the conveyance, avail himself of all the remedies for collecting the debt out of the property, or its avails, which the law has provided in favor of creditors ; and that, in pursuing those remedies, he may treat the property as though such conveyance had not been made ; that is, as the property of the fraudulent vendor. The conveyance is ineffectual to shield the property in the hands of the vendee, from the just claims of the creditors of the vendor, when those claims are prosecuted against it in the manner pointed out by law. Not that a creditor may seize it without any legal process, in the hands of the fraudulent vendee, and appropriate it of his own head to the payment of the debt due by the vendor ; neither the general principles of law, nor the particular laws which are enacted for the collection of debts, confer any such right on the creditor. He may cause it to be appropriated to the payment of his debt, but he can do this only in the mode the law prescribes ; and if he departs from that mode, his proceedings are unauthorized by law, and, therefore, wrongful ; and he thereby makes himself liable as a wrong-doer to the owner of the property, who, where there has been no conveyance, is the debtor, and where there has been a fraudulent one, is the vendee, because such vendee's title is good against the vendor, and also against all others, including the creditors of the vendor, who do not protect themselves against him by pursuing that prescribed course by which alone the property can be made available to creditors. A creditor at large, as it is termed, can not impeach the conveyance,

but only a creditor having some process on which the property may be lawfully seized, and by which it is made liable, either immediately or ultimately, to be appropriated in satisfaction of his debts. Such process, by our law, is an attachment or execution, to one of *which it is necessary for a creditor to resort, and to either [258 of which he may resort, in order to avail himself of the property thus fraudulently transferred. Without such process he has no right to meddle with the property; and if he should do so, he would be liable to all the consequences of an unlawful interference with it, equally with any other person who was not a creditor. After the property is seized on an attachment or execution, it is further necessary that all the subsequent steps prescribed by law, should be taken with it. In the case of an attachment, the creditor must pursue the action in which the property was attached, to judgment and execution; and the latter must be in the manner pointed out by law. If any of these steps are omitted, the property is discharged from the lien created by the attachment or execution, and must be restored to the owner. That owner, in the present case, would be the plaintiff."

This case, and others which might be cited, seem to establish that the fraudulent vendee can not, through or with his creditor, avoid his sale. Whether a subsequent sale, made by the vendor in the payment of a debt, can have the effect of avoiding the fraudulent conveyance, is, indeed, left an open question in the case named. Indeed, it is not even declared that *any* purchase whatever, from the fraudulent vendor, made subsequent to the fraudulent conveyance, may not stand against it. The court says: "If the defendant were a purchaser, the case would present the question (at least as to the personal property), whether a fraudulent grant would prevail as between the grantee and a subsequent purchaser. This question would not be free from difficulty." But the question, though difficult, is not unanswerable; it appears to us to be solved by the reasoning of the Connecticut court itself, against the validity of any such subsequent sale; and certainly the argument of counsel for the plaintiff in that case furnishes at least one good reason against upholding any such sale. It is well put, that, "allowing that the contract was fraudulent, and that the creditors might treat it as a nullity, still it can be so *treated only in the course of [259 legal proceedings. In the first place, the plaintiff (the fraudulent vendee) was interested, and had a right to have the property sold

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in the manner provided by law. Secondly, he was entitled to the *surplus*, in all events."

When it is remembered that a sale may be fraudulent notwithstanding the full payment of a fair price, this reasoning will appear to be worthy of great attention. Many cases may be supposed, in which the vendee, improperly influenced, and weakly yielding so far as to become a party to the fraud in the first instance, may be induced by repentance, or even an intelligent selfishness, to do right to the creditors; and there seems to be no good reason why he should not be allowed to do it without subjecting the creditor to injury or disappointment. It would be a great hardship if he could not act so honestly without the formal assent or ratification of a vendor, who may have absconded (as Garnier did), or if the fraudulent vendor could dispose of property, in which, after paying all just claims on it, the vendee may have a large and valuable interest. Not a case can be found in which, with the vendor's assent, sometimes implied from his mere presence or silence, the vendee has not been allowed to convey; no conveyance by the vendor himself, no formal participation on his part in it, is ever required. Now, with the greatest possible regard for those who insist on the vendor's assent as necessary to the conveyance, we must be allowed to say that such assent is not of the slightest value so far as *power* is concerned.

When Garnier sold this property to Bour, he effectually assented, *in fact*, to whatever Bour might choose to do with it; and he effectually assented, *in law*, to whatever his vendee might honestly do with it. His sale did not become revocable the moment Bour proposed to pay the creditors with the property and revocable then only. In this case, as in many others, the better trustee for the the creditors proved to be the fraudulent vendee; far better, that is to say, than the fraudulent vendor. It would be a strange rule of 260] law *which would prefer a disposition made by one in Garnier's position, to a conveyance like that of Bour.

Indeed, of the many illustrations which might be furnished to show how entirely free from liability to abuse is the right we have recognized in a fraudulent vendee, and how beneficial may often be its operation as to creditors, no case is better than that before us.

In circumstances showing fraud as to creditors, Garnier sells his goods to Bour. He then absconds; before his return Bour acts the part of an honest man; and without suit, and, so far as we know,

for the single purpose of paying a debt for which the goods ought to be bound. executes a mortgage for the most diligent creditor. Garnier may never return. Shall the creditor be put to suit, and Bour to costs of suit, or shall the creditor, by the mere act and agreement of the vendee, have that preference which is the reward of diligence? The rights of other creditors, however, are supposed to conflict with the exercise of the power we allow to the vendee. But how? The most diligent creditor has a right to the fruits of his diligence. And, in this particular case, it is plain that, as to other creditors, Brown & Co. obtained nothing which Garnier himself might not well have given them.

If it be answered that Walter Stone had, or might have, some peculiar claim to preference, and that a returning sense of justice on the part of Garnier might have induced him to make that preference, we must suppose that case and proceed to try it according to established principles of law. What peculiar claim to preference is known to the law or should be protected by it? Is there any but diligence in pursuing the goods? Do not all creditors stand alike before the law as to their claims on an insolvent estate, until some one acquires the superior claim of diligence and vigilance? I think it can not be conceded that the law will countenance or protect any other preference; for, in the very nature of any other is necessarily implied that of an intention to hinder some other creditor. And, in the case last supposed, if Garnier [261 had recognized the right of Stone, and the latter had, in anticipation of another creditor, presented himself to the vendee, the refusal of the vendee to pay him would drive him to suit, and he would still have and secure the benefit of his superior vigilance. Moreover, after such demand by the creditor preferred by Garnier, Bour could hardly have made any arrangement to prefer another creditor, in anticipation of the process of him who first presented himself; and in every such case the arrangement would be a fraud in the vendee, while in ninety-nine out of a hundred it would be equally fraudulent in the creditor so favored by the vendee.

It is unnecessary to pursue this investigation of the supposed consequences of allowing the vendee to purge himself of fraud, in the manner we have recognized as just and lawful. The reasons given in the charge excepted to, are quite satisfactory on this subject, and we adopt them fully.

We are satisfied that a conveyance made to defraud, can not be

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characterized simply as void against creditors. The doctrine, which is to be collected from authority and reason, seems to be, that a sale of goods, made with intent to defraud the vendor's creditors, is absolutely void only against the legal process of the creditor.

The utmost concession allowed by the law to the interests of creditors, leaves it still certain, that until a seizure by a creditor's writ, the fraudulent vendee can do with the property all that the vendor might have done had he retained the goods. Now, the vendor might have given the mortgage, notwithstanding the claim or process of any other creditor, unless the very object of the mortgage was to defeat that claim or process. Why, in the absence of such fraudulent intention to defeat the claim of any particular creditor, the fraudulent vendee may not execute a like mortgage to secure a particular creditor, I confess I am wholly unable to perceive; and I am quite willing, in every such case, to dispense with a thing so vain and insubstantial as the formal consent or ratification of one who has long since parted *with all his property in the goods mortgaged. If the vendor repent of his fraud, and feel disposed to secure any creditor who may demand such security, the effect of notice given by him to the vendee of such desire, upon any other and subsequent disposition of the property in behalf of some other creditor, is to be determined by inquiring whether there was any good reason, relating to vigilance, or anything else, for preferring the creditor named by the vendor. These are matters to be considered when some case shall present them. They are not before us now. Here is no question of defeating or postponing any claim whatever.

Our conclusions, then, may be thus stated: A conveyance by a fraudulent vendee of goods in payment or security of the vendor's debt, requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property. No just preference of creditors can be thus defeated; since in every case in which the claim of the creditor is fair, the law would reward the greater vigilance of the creditor, and deny to any other creditor a preference resting in the favor or fraud of the vendor himself. Nor can the vendor suffer by allowing such a right in his vendee; for if the consideration remain unpaid, he can well question the amount to be paid by the vendee, if the whole fraud has been removed on his own part; and if the consideration be wholly paid,

the vendee would pay at his own immediate expense and his own ultimate peril.

As to the mortgage, the charge of the district court was, in our judgment, a correct exposition of the law. It is unnecessary to say whether we agree or disagree to the intimation in 20 Ohio, that this mortgage could be treated as within the statute, providing that certain conveyances, when made to prefer certain creditors, shall in chancery inure to the benefit of all. We would merely remark, that the *syllabus* of that decision appears to go beyond what was intended to be decided in that case, and that the language of Caldwell, J., is not nearly so strong as to justify that of the *syllabus*.

*The judgment of the district court must be affirmed. [263]

RANNEY, J. In my opinion this judgment should be reversed. The case was before the Supreme Court at the December term, 1851, 20 Ohio, 389. As the record then presented it the defendants in error had attempted, in the court below, to sustain their mortgage by showing that it was made with the assent of both Garnier and Bour. But the court, in effect, charged the jury that the title would still be invalid if the mortgage was taken with knowledge that the conveyance from Garnier to Bour was fraudulent. This instruction was held to be erroneous, and the cause was remanded for a new trial. The point upon which the decision was made is thus stated by Judge Caldwell, who delivered the opinion of the Supreme Court: "Before the sale of the goods to Bour, the plaintiffs would have had a right to have their claim secured by a mortgage from Garnier on the goods; and we do not see why Garnier and Bour might not agree, as they did, that plaintiffs might have the benefit of the goods as security for their debt, as though no such sale had taken place. They were thus doing away the fraud committed by the sale, and using the goods in the way the law required they should be used—in the payment of Garnier's debts."

The district court, very properly, considered themselves bound by this decision; but in giving effect to it they mistook the very turning point upon which it was made, and instructed the jury that notwithstanding the transfer by Garnier to Bour was fraudulent as to the creditors of Garnier, it was still competent to Bour to make a valid mortgage of the goods to one of the creditors of Garnier, having notice of the fraud, *with or without the assent of Garnier*. The assent and concurrence of Garnier was made indis-

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pensible to its validity by the Supreme Court, and made wholly immaterial by the district court. Now, in my opinion, the decision of the Supreme Court is as clearly right as that of the district court is clearly wrong. The first resting upon settled principles, applied in numerous adjudications; and *the last, so far as I know, unsupported by either. That the assignment made by Garnier to Bour was fraudulent, is conceded. No attempt is made by either party to uphold it. The legal consequences are that the conveyance was effectual between the parties to the fraud, and utterly void, to all intents and purposes, as to the creditors of Garnier. But while the law left Garnier without remedy to compel a restoration of his goods, it still recognized the moral obligation of Bour to restore them; and if he availed himself of the *locus penitentiae*, and complied with this moral duty, it so far respected his act and intention as to relieve him from accountability as a trustee to the creditors of Garnier, which rested upon him while he retained the possession. This was so held in *Swift & Nichols v. Holdridge*, 10 Ohio, 230. Judge Lane says: "An honest man will not take a fraudulent conveyance. If a man holds property fraudulently conveyed, as soon as he comes to a sense of his moral duty he will restore it to those to whom it belongs; he ought to give it back to him from whom he received it, that it may be applied to his debts if wanted, or to his benefit if not necessary for this purpose. The law to discourage frauds does not compel him to restore it to the fraudulent grantor; yet no man will retain it for a moment who desires the reputation of honesty, or possesses the sense of justice." "And if the fraudulent holder has in good faith divested himself of that which he could not retain without dishonesty *before* the right of the creditor has accrued, there is nothing remaining upon which to raise a trust, and the relation of trustee to anybody subsists no longer."

While the property remained in the hands of the fraudulent grantee, the grantor could make no valid conveyance of it, either to a creditor or purchaser, for valuable consideration, because he could only convey to his second grantee such right as he had; and having no right to reclaim the property from the fraudulent holder, he could give such grantee no right. As against any creditor of the grantor, the grantee could make no valid conveyance of the [265] property *to one having notice of the fraud; because, as against such creditor, his title was utterly void, and having no

title himself, he could convey none. Under such circumstances the property can be effectually reached only by one having rights superior to either of the fraudulent parties—judicially ascertained and enforced in the manner provided by law. It can not be done by a conveyance from either, which can rise no higher than the source from which it is derived; but it must get its efficacy from the disposition which the law makes of subjects within its control.

But before Garnier parted with his property, or after it was restored to him, he might convey or mortgage it in good faith to one of his creditors; although the effect might be to deprive others of their recourse upon it. By our law this is rather permitted than encouraged. The law does not regard the particular form in which this may be done; it looks at the substance of the transaction, and from that, fixes the rights of the parties. When, therefore, Garnier and Bour concurred in mortgaging the property to the defendants in error for a debt that Garnier owed them, it was, to every substantial purpose, a restoration of the property to Garnier, followed by a valid mortgage from him upon it. In the language of Judge Caldwell: "They thus did away the fraud committed by the sale, and used the goods in the way the law required they should be used—in the payment of Garnier's debts." Bour's concurrence was necessary to evidence his willingness to restore the property, and Garnier's to give the preference which the mortgage secured. This was the case supposed to be made in 20 Ohio, and these the considerations upon which the judgment was based.

But this case was not made upon the new trial; and leaving Garnier entirely out of the account, the court lay down the broad doctrine, that a fraudulent grantee may lawfully defeat or postpone one of the creditors of his grantor, by making a mortgage to another. Upon what principle can this be done? The law, in the most positive terms, declares every conveyance made to defraud creditors, null and void *as to each and all of them; and gives to [266 each the perfect right to pursue the property by legal process, precisely as though it never had been made. Stone had the same right as Brown & Co., and was as well entitled as they, to the reward of his diligence, if he first levied his execution upon the goods. If Bour had received no conveyance from Garnier, and had made to Brown & Co. a mortgage, would it be thought that he could in this way give them a lien upon the goods to stand in the way of Stone's execution? If not, what better is a conveyance than the

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law declares an absolute nullity, than none at all? "Void things are as no things," and, as against Stone, Bour acquired no interest in, or power over, the goods, by the conveyance. It was not void, for some purposes, and valid for others; but it was an absolute nullity for *every purpose*; and so completely so, that the law ignores its very existence. So far as every creditor of Garnier was concerned, the property still belonged to him; the ownership and possession was his, and it was liable for his debts in the same manner, and to the same extent, as though he had never attempted to convey it away. Brown & Co., it is true, were honest creditors of his; but being an honest creditor is one thing, and having a lien upon the debtor's property, to the exclusion of other honest creditors, is quite another and distinct thing. The law treats all honest creditors alike; and except in the case of assignments, governed by the statute, gives the preference to the one who first attaches a specific lien upon the property. This can be done but in one of two ways; first, by the levy of legal process; or, second, by conveyance or assignment from one having power, *as between the creditors*, to give the preference. Stone first levied upon the goods, and thus obtained priority; but he has been deprived of his legal right to the reward of his diligence, by the previous intervention of the fraudulent grantee, in favor of another creditor having full notice of the fraud. That this was a void act as against him, seems to me so obvious, as to defy all effort at reasoning. It is certain that Bour had nothing 267] but what the fraudulent assignment *gave him; and equally certain, that he could convey to Brown & Co. no more than he had. That assignment gave him a perfect title as against Garnier, and everybody else but Garnier's creditors; and he could, therefore, invest Brown & Co. with the same perfect title as against all such persons. But it gave him no right or title whatever, as against a creditor of Garnier, and it would seem to follow that he could confer none upon Brown & Co. Without the mortgage, they had no lien upon the property; and as Bour, so far as Stone was concerned, had none, it is legally impossible that they should have derived any from him. So far as the mortgage goes, they took his place, and stood in his shoes; and as he was utterly powerless to withhold the property from Stone's execution, they were equally so. Nor, had they any right to, or lien upon, the goods independent of the mortgage. As creditors at large, it is conceded they could not ac-

quire any such right, or lien, by taking possession of the property, either from Garnier or his assignee.

But much is said in the argument of the equitable right to compel Bour to deliver the goods to them, or to apply them in security of their debt; and it is hence inferred that if he has done but what the law would have compelled him to do, the arrangement can not be disturbed. To say nothing of the conclusion, the premises upon which this argument is built, are laid in entire mistake. Bour owed them no such duty, and they had no such remedy. At no time could they have compelled Garnier or Bour to give them security for their debt. Bour's simple duty was to restore the goods to Garnier, in good order that he might apply them in satisfaction or security of his debts, if he saw proper; or, if not, that they might be within the reach of legal process in his hands. But, as is said by the court in *Swift v. Holdridge*: "The relations between him and the creditors of the debtor are different. There are no *express* obligations between them; no promise to be accountable to them; no obligation to restore to them." "The character of *cestui que trust* does not belong to the general creditor, until he has shown himself *entitled to the debtor's [268 property by the recovery of a judgment." The rights that the law conferred upon Brown & Co., it conferred upon Stone, and every other creditor of Garnier. What it did for one, it did for all. For their benefit it annulled the fraudulent assignment, and left the goods subject to seizure upon legal process, precisely as though it had never been made. Every creditor had an equal right to make such seizure; and when he had made it, a perfect right to appropriate the property to the payment of his debt, in preference to those who were later in time, or who had not levied upon it. This right belonged to each creditor, *as such*—was paramount to the rights of either of the fraudulent parties, and beyond their control. Stone availed himself of it, obtained a judgment, and levied upon the goods.

Brown & Co. never recovered judgment, and never levied upon the property. Mere general creditors having no power, by their own act, to fasten a lien upon the property, they have undertaken to get one from the fraudulent assignee, who had no more power to take from Stone this paramount right, with which the law had clothed him, than he would have had if he had never heard of Garnier or the property. At one moment, Brown & Co. claimed

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under him, and the next adversely to him. In either way, their claim against Stone is utterly groundless. Without him, they had no right to take the goods without process, and if they did, were trespassers; with him, and under him, they could get no more than he had, and could get no rights as against Stone, for the plain reason that he had none. And yet, by a most singular application of legal principles, as it seems to me, without the least power in either of the parties to arrest the due execution of Stone's legal process, the two together have been enabled to turn two blanks into a prize, so as to deprive him of a legal right, as nearly perfect as any that the law confers.

But it is further insisted that Garnier, by the assignment, invested 269] Bour with full power to make the mortgage to Brown & Co., or any other disposition of the property he might see fit; and, therefore, that the mortgage was made with the assent and concurrence of both Garnier and Bour. This argument assumes as undoubted what no amount of reasoning could establish. It supposes the fraudulent deed to be operative for this purpose against Stone, a *bona fide* creditor of Garnier, when exactly the opposite is indisputably true. It is not doubted, that it divested Garnier of all interest in, or power over, the goods, and as against him clothed Bour with all the attributes of perfect ownership. But in respect to Garnier's creditors, as I have already said, it was utterly void—a perfect nullity—for every purpose. As against them, it invested Bour with no right of property or possession, and no power of disposition. It was fraudulent and void in all its effects and consequences, direct and incidental. A man can no more, by a fraudulent instrument, give a power of disposition of his property to the prejudice of any one of his creditors, than he can make a valid conveyance of it. Much less can there be elicited from an ineffectual cheat by conveying the property, an incidental power to make a valid disposition of it at the discretion of the fraudulent vendee.

I have considered the case as though Bour had given the mortgage to secure Garnier's debt. Such, however, is not the fact. Brown & Co. assigned to Bour their claims against Garnier, and took Bour's notes for the amount, and for the security of Bour's notes the mortgage was taken; so that the proceeds of the property did not pay Garnier's debt, but it was left open and subsisting in the hands of Bour. But I do not care to pursue this view of the

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subject. I am content to let the case depend upon the right of a fraudulent assignee to defeat the legal process of one creditor of his assignor by making a mortgage or conveyance to another. The power to do this, with perfect respect for the better judgments of my brethren, I feel constrained to deny. I can never agree that a fraudulent conveyance or assignment is anything more than a nullity to every intent and for every *purpose; nor can I believe [270 that one so justly odious in the sight of the law, as the fraudulent recipient of the debtor's property has always been held to be, is invested with the high prerogative of deciding between those he has endeavored to cheat, or that their respective rights can be made to depend upon his sense of justice.

LEVI FROST, JR. v. BENJAMIN SHAW AND MOSES A. BIRCHARD.

The owner of the chattel property, which is exempted by law from execution and sale for the payment of debts, is not divested of the right of disposing of it by pledge, in security for the payment of his debts; and in case of a pledge or chattel mortgage the owner clearly waives the benefit of exemption, so far as the incumbrance extends or is operative.

Where, by the terms of a chattel mortgage, the mortgagee, at the maturity of his debt, has the right to the possession of the property, and he sees proper to reduce his debt to judgment, and then, through his agent, to turn out the mortgaged property, and have it sold under the authority of an execution for the payment of his debt, the debtor sustains no injury in the right of possession in the property, which would support an action of trespass, even although the chattels thus mortgaged and sold belonged to the enumerated articles exempted by law from execution.

There are certain enumerated articles which are absolutely exempted from execution, and which the officer is bound at his peril to notice and not take on execution, unless turned out by the debtor, by a waiver of his right of exemption; but there are other articles, the exemption of which from execution depends on the *selection* to be made by the debtor.

Where the exemption depends on the selection to be made by the debtor, the selection should be made at the time of the levy, if the debtor be present; but if not present, then it should be made, and notice given to the officer, within a reasonable time thereafter, and before sale. And without such selection, the right to the benefit of the exemption does not exist as to those articles which the statute authorizes the debtor to select.

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In an action of trespass against an officer, for a seizure and sale on execution of chattels which are exempted by law from execution and sale, on the selection of the debtor, it is indispensable, in order to sustain the action, that the plaintiff should establish his right to the exemption, by proof of his selection of the property for the purposes contemplated by the statute.

WRIT of error to the district court of Portage county.

The original action was trespass instituted by the plaintiff in [271] error for the recovery of damages for the levy and sale *by execution of certain chattels, consisting of one yoke of work-cattle, one ox-yoke with the bows and irons, six sheep, and one cow, which he claimed exempted by law from seizure on execution for the payment of debts. It appears that the plaintiff in error, being indebted to persons of the names of Vangorder & Canfield in the sum of \$68.83, did, on the 3d day of November, 1845, give to them his promissory note for that amount; and, as security for the same, delivered to them a chattel mortgage of the property above mentioned (with the exception of the ox-yoke with the bows and irons), conditioned to be void on the payment of the note at maturity, providing in the mortgage that the property was to remain in the plaintiff's possession until the note should become due, and if not then paid that the property should be redelivered to said Vangorder & Canfield, which said chattel mortgage had been duly filed in the office of the clerk of the proper township. The note having become due and remaining unpaid, Vangorder & Canfield caused judgment to be taken on it against the plaintiff in error before a justice of the peace, on which execution was issued to defendant Shaw, acting as constable, who, by virtue thereof, and by direction of the defendant Birchard, as agent of the plaintiffs in the execution, levied on and sold said chattels to satisfy said execution. Thereupon the plaintiff in error commenced suit against the defendants in error, claiming that the property so sold was exempted by law from execution. On the trial of the case in the court of common pleas, a verdict was rendered in favor of the defendants; the plaintiff moved for a new trial, but the motion being overruled and judgment rendered on the verdict, he excepted to the ruling of the court. The evidence offered on both sides on the trial is set out in the bill of exceptions; from which it appears that, at the time of the date of the chattel mortgage, and also at the time of the levy and sale on execution, the plaintiff was a man of family, engaged in the business of agriculture; and the oxen, levied on as

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aforesaid, was the only team he had, and the ox-yoke, with its appendages, the *only and necessary gearing for the same; [272 and, also, that the cow so taken was his only cow.

The case was taken to the late Supreme Court of Portage county by writ of error, where the judgment of the common pleas was affirmed. And this writ of error is prosecuted to reverse the judgment of affirmance of that court.

It is assigned for error that the common pleas instructed the jury that the plaintiff in error had, by means of the chattel mortgage, waived his right to hold the property in question exempt from execution for the collection of the mortgage debt.

Lucius V. Bierce, for plaintiff.

Ranney, Tilden, and Matthew Birchard, for defendants.

BARTLEY, J. Although the humane provisions of the law exempting certain articles of necessity from execution for the payment of debts may be entitled to a liberal construction, the settled principles which govern the rights of private property are not to be overlooked. The owner of the chattels exempted from execution is not divested of the right of disposing of the property himself, either by sale or by pledge in security for the payment of his debts. And in case of a pledge or chattel mortgage, the owner clearly waives the benefit of the exemption, so far as the incumbrance extends or is operative. It appears in this case, that this debt remained unpaid, and that, by the express terms of the mortgage, not only the right of property, but also the right of possession in the property in controversy, except as to one article, passed to the mortgagees after the maturity of the note. The creditors had an undoubted right to take possession of the property under their mortgage and dispose of it for the payment of their debt, leaving the plaintiff divested of all rights, except that which would depend on the contingency of an overplus after the payment of the debt. But it appears that the creditors chose to reduce their debt to judgment, and then, through their agent, the defendant Birchard, to turn this property out to the *constable on execution. [273 This could not have furnished the plaintiff in error any substantial ground for very serious complaint. But if any legal objection did exist to the form adopted by the creditors for the dis-

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position of the property for the satisfaction of their debt, it did not furnish ground for an action of trespass, which is founded on an injury to a person in his right of possession in his property. By virtue of the chattel mortgage, both the right of possession and the right of property in all the chattels, excepting one, had passed to the mortgagees; and if they deemed it proper, through their agent, to take possession of the property and have it sold under the authority of an execution, no wrong was done the plaintiff in his right of possession for which he could sustain an action of trespass.

But it is urged, with much force and ingenuity, by the counsel for the plaintiff, that the seizure and sale, on execution, of one of the chattels, consisting of an ox-yoke, with its appendages, which was not covered by the mortgage, sustained the action; and that the court of common pleas erred in the charge to the jury in reference to this article. The statute authorizes a person of a family, "if he be engaged at the time in the business of agriculture, to select one work-horse, or mare, or one yoke of work-oxen, with the *necessary gearing* for the same," which he may hold exempt from execution or sale for debt. Swan's Rev. Stat. 710. We are saved the necessity of considering the question whether the "*necessary gearing*" could be held exempt from execution when the debtor had parted with the oxen, by the fact that it does not appear in this case that the plaintiff had laid any foundation, by proof, for his right to the benefit of the exemption, as to this article, which, by the terms of the law, depended on his *selection* of it, as necessary for carrying on his business of agriculture. There are certain enumerated articles which are absolutely exempted from execution, and which the officer is bound, at his peril, to notice, and not take on execution, unless turned out to him by the debtor waiving his 274] right to the exemption. But there are other *articles, including that now in question, the exemption of which from execution, by the terms of the law, depends on the selection to be made by the debtor at the time of the levy, if he be present; but if not present, he should make the selection, and notify the officer of the same, within a reasonable time thereafter, and before the sale. Without such selection, the right to the benefit of the exemption does not exist as to those articles which the statute authorizes the debtor to select, and when no such selection has been made, it is the duty of the officer to proceed to levy on and sell the property. The plaintiff, therefore, having failed to show that he had selected this article to

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be held as necessary to his business, failed to establish his right to the exemption, and, consequently, his right to maintain an action for the taking and sale of the article on execution.

The judgment of the court below is affirmed.

GEORGE F. THOMAS v. THE ADMINISTRATOR OF WILLIAM P.
MILES, DECEASED.

T. and M., partners in trade in the city of C., agree to dissolve partnership, M., the party retiring from the establishment, binding himself that he shall not, within five years, enter into nor be concerned in the kind of business conducted or carried on by the said firm, nor any branch thereof, within the said city, nor interfere in any way with any agency before established by the firm, nor establish any similar agency that may interfere or compete with any agency of the firm or of the party succeeding to its business upon its dissolution, whether such agencies be established in the said city or elsewhere: *Held*—

That such a contract was reasonable and proper, so far as it restrained M. from engaging, for a limited time, in the city of C., in the business theretofore pursued by the firm.

But so far as it attempts to prevent M. from interfering or competing with any branches that T. might establish at any and all other places, it is clearly opposed to public policy, and is therefore void.

Such a covenant is divisible, and does not constitute a breach of its legal obligations, if, within the time limited, M. should become employed at a distant point as an agent or otherwise, in the business in which the firm was engaged. *Lange v. Werk*, 2 Ohio St. 519.

*ERROR to the district court of Hamilton county.

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The case is stated in the opinion of the court.

Fox & French, for plaintiff.

Coffin & Mitchell, for defendant.

RANNEY, J. Thomas and Miles were partners in trade, dealing in fancy goods, cabinet-makers' trimmings and furnishings, and patent medicines, in the city of Cincinnati. On the 11th of August, 1849, they agreed to dissolve the partnership, upon certain conditions expressed in a written agreement of that date. It was stipu-

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lated that the parties should bid against each other for the whole partnership interest, and that the highest bidder should take the whole property at the price bid. The party accepting the offer then bound himself to the purchaser, in the sum of ten thousand dollars as liquidated damages, in the following stipulation :

"The party accepting such offer shall not, at any time within five years from the date hereof, enter into nor be concerned in the kind of business which has heretofore been conducted or carried on by the said firm of Thomas & Miles, *or any branch thereof*, within the city of Cincinnati, and shall not in any way interfere with any agency that has been established by the said firm, now established, nor establish any similar agency or agencies, that may interfere or compete with any one or more that may hereafter be established by the party making the offer that has been so accepted, whether such agencies shall be located in Cincinnati or elsewhere."

At the sale made in pursuance of this agreement, Thomas became the purchaser of the interest of Miles; and he alleges as a breach of the covenant quoted above, that Miles did, within five years, and before the commencement of this suit, enter into and was concerned in the same kind of business which had been theretofore carried on by said firm of Thomas & Miles, within the city of Cincinnati. Issue being taken upon this allegation, on trial in the Commercial Court, the evidence given by the plaintiff was overruled, as not tending to prove the breach alleged, and a judgment of nonsuit ordered.

Tested by the general principles applicable to contracts of this 276] character, as settled by this court in *Lange v. Werk*, 2 *Ohio St. 519, this agreement seems to have been reasonable and proper, and founded upon a sufficient consideration, so far as it restrained Miles from engaging, for a limited time, within the city of Cincinnati, in the business theretofore pursued by the firm, and which it may fairly be inferred was expected to be continued by Thomas.

So far it is only a partial restraint of trade, no more extensive than was necessary to afford a fair protection to the purchaser of the whole partnership interest; while the influence it might have upon the value of that interest, and the inducement it furnished to bid higher for it, would seem to furnish a sufficient pecuniary consideration to uphold the contract. Subjected to the same test, it is almost equally clear that the obligation not to interfere or compete with any branches that Thomas might establish at any and all

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other places, is in general restraint of trade, opposed to public policy, and therefore void.

The covenant is, however, divisible, and the question is, did the evidence given tend to show a breach of the obligation not to enter into or be concerned in the business in Cincinnati?

We are clearly of opinion that it did not. It appears that Miles, soon after the dissolution of the partnership, left Cincinnati, and went to reside at Trenton, in New Jersey. Before leaving, or when back on a visit, he made an arrangement with some cabinet-makers, and an omnibus manufacturer, personal friends and acquaintances of his, to furnish them certain articles needed in their line of business, saying that he should be frequently in New York and Philadelphia, and could buy there and furnish them lower than they could be bought in Cincinnati. Under this arrangement, several bills of goods were purchased and furnished accordingly. Now, what was the object of this stipulation in the agreement? Unquestionably to avoid the competition of a rival establishment located in Cincinnati. It did not, upon any fair interpretation, prohibit Miles from pursuing the business elsewhere, and dealing with customers residing in Cincinnati. It has relation alone to the locality [277] where the business is pursued, and where the establishment might be found by any person desirous of purchasing the goods that were kept for sale. He shall not enter into or be concerned in the business "within the city of Cincinnati." To speak of a New York merchant selling goods to Cincinnati customers as engaged in business in Cincinnati, would be such an obvious impropriety of language as to arrest the attention of the least observing, while such an extension of the language of a contract which the law *prima facie* regards as opposed to public policy, and under the most favorable circumstances barely permits, but never encourages, would be altogether inadmissible.

The judgment must be affirmed.

JOSEPH CREPS v. GEORGE W. BAIRD.

Taxes due upon lands are a personal debt of him in whose name the lands are listed when the taxes accrue, as well as a lien upon the lands, unless "the same are not his property, and are erroneously charged in his name for taxation."

The rule of *caveat emptor* applies to purchasers at judicial sales.

It follows that if lands, incumbered by a tax lien, are sold upon execution, and the taxes are afterward collected from the judgment debtor, by distraint of his personal property, or other proceeding under the tax law, he is without recourse upon the purchaser of the land, notwithstanding the incumbrance is thereby removed. On the other hand, if the taxes are made by a sale of the lands, the owner has no action against the judgment debtor, although the debt of the latter is thus paid. There is no relation of principal and surety between the parties.

It may be presumed from circumstances that an order of court was made upon the motion of a particular person, where the record does not show who was the mover.

If, upon the motion of a purchaser upon execution, surplus money remaining after the satisfaction of the writ, and to which the judgment debtor is entitled, is, by order of the court, and without the consent of the debtor, applied to discharge taxes due upon the land when sold, such debtor may, after a reversal of the order, recover the sum thus applied, from said purchaser, in an action of assumpsit for money paid to his use.

278] *And such action may be maintained, although no order of distribution, expressly directing said surplus to be paid to the judgment debtor, has been made, there being no other claimant of the money.

It is not meant, by this decision, to deny to purchasers at judicial sales, the well-known equitable relief resulting from a marshaling of assets, where the creditor has a lien upon two or more funds.

ERROR to the district court of Wood county.

This is a petition in error filed to reverse a judgment of nonsuit rendered by the district court of Wood county, on the following agreed statement of facts:

That the plaintiff, "on the first day of July, 1850, and for many years previous to that time, was the owner of the south half of in-lots Nos. 363 and 383, and in-lot No. 359, in the town of Perrysburg, excepting twenty feet six inches by thirty-two feet of the northeast corner of said south half of in lot No. 383, in said town, and county of Wood, and State of Ohio. That one Julius Blinn, as sheriff of said county, under and by virtue of a writ of execution issued from

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the court of common pleas of said county, on a certain judgment therein existing in favor of Eber Wilson, against Joseph Creps, and which had been previously levied on the premises above described, had duly advertised said property, and the same was then duly sold at public sale, by said Blinn, as such sheriff, under and by virtue of said execution, to the defendant, for the sum of fourteen hundred dollars; and that said sale was duly returned by said sheriff to said court, indorsed on said execution; and that, at the October term, 1850, of said court, said sale was duly confirmed; and that, at the same term of court, said court caused an order to be entered on the journals thereof, finding due on said premises, at the time of said sale to said Baird, the sum of three hundred and fifty-seven dollars and seventy-six cents, of back taxes, and ordering said sheriff to pay over to the treasurer of Wood county said sum of three hundred and fifty-seven dollars and seventy-six cents, out of the proceeds arising from said sale; and that said sheriff did pay said sum of money to said treasurer, in pursuance of said order of court, *without notice from the plaintiff; and that on the [279 6th day of December, A. D. 1850, the plaintiff procured the allowance of a writ of certiorari from the judges of the Supreme Court of the State of Ohio, on said order of said court of common pleas above set forth. That said writ of certiorari came on to be heard at the July term, 1851, of the Supreme Court, within and for said Wood county; and the order of said court of common pleas directing the payment of said sum of money by said sheriff was then reversed, and said order held to be erroneous and void. That said George W. Baird entered into possession of said property under said sale and confirmation. It was further admitted, that said amount of money so paid by the sheriff was surplus money, over and above payment of the judgment on which said property was sold; and it was further admitted, that the order of distribution, which was reversed as aforesaid, is the only order of distribution in respect of said money made on said execution that has ever been made. It was also in evidence, that there were other judgment liens on said property, which have been before this suit set aside. And this was all the evidence offered on the part of the plaintiff." The district court held this proof insufficient to sustain the plaintiff's right of action, and rendered judgment accordingly.

James Murray, for plaintiff in error.

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A. Cook, for defendant in error.

THURMAN, C. J. That taxes due upon lands are a personal debt of him in whose name the lands stand listed when the taxes accrue, as well as a lien upon the lands, unless "the same are not his property, and are erroneously charged in his name for taxation," is very clear from the provisions of our statutes. Swan's Stat. (new ed.) 68, sec. 41; 1010, sec. 19; 1015, sec. 2.

That the rule of *caveat emptor* applies to purchases at sheriff's sales upon execution has been uniformly held in this state, and the doctrine is too well settled to be shaken. Vattier & Lytle's Ex'rs, 6 Ohio, 477.

280] *From these premises it follows, that had the taxes in question been collected from Creps, by a distraint of his personal property, or other proceeding under the tax laws, he would have been without recourse on Baird, notwithstanding the lands of the latter would thereby have been relieved from an incumbrance.

On the other hand, had they been made by a sale of Baird's lands, he would have had no action against Creps, notwithstanding it was the debt of the latter that would thus have been paid.

For there was no relation of principal and surety between these parties. By purchasing the land, Baird did not become personally bound to pay the overdue taxes, and consequently Creps could not compel him to pay them.

On the other hand, Baird took the land without any warranty, express or implied, and therefore he had no right to compel Creps to pay.

Did he compel him to pay? It is argued that he did not, because it does not expressly appear that it was upon his motion that the order of the court was made.

This point has given us some difficulty, but we incline to think that the evidence tended to prove that the order was made at Baird's instance, and if so, it should have gone to the jury. There was no one, so far as appears, who had any interest to procure it but Baird. Creps evidently had no such interest; for if it had not been made he would have got the money, and possibly would never have been compelled to make payment. It is presumable that he had no personal property subject to distraint sufficient to pay the taxes, for if he had, it is not probable the lands would have remained delinquent. It was his interest, therefore, to get the money, and let the taxes

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be made out of the lands, as thereby his debt would be discharged without, as I have before shown, his incurring any new responsibility.

Neither had the judgment creditor any interest to make the motion, for he was fully-paid. The fund out of which the taxes were discharged was surplus money, remaining after the execution was satisfied.

*Nor is it reasonable to suppose that the county treasurer, [281 who was no party to the proceedings, interposed and made it. It was not incumbent on him, in the discharge of his official duties to do so, and he would hardly have volunteered to interfere when there was no necessity for his action; the lien on the lands being an ample security for the taxes.

Under these circumstances, and the record being silent as to who procured the order, it can not be said that a jury would have been unwarranted, in the absence of any proof to the contrary, in finding that it was made upon the motion of Baird. At least that was the tendency of the proofs, and it was therefore the province of the jury to pass upon them. Had the testimony gone to the jury, its sufficiency would have been matter of argument before them; or, Baird might have introduced rebutting testimony, if it existed, to overthrow the presumption arising upon the plaintiff's showing.

Another point is, that the action could not be maintained, because, as the money went to pay a debt of Creps, it was not money paid to Baird's use.

But no one has a right to take the money of a debtor, and without his consent, express or implied, apply it to the payment of his debts; and if such payment inure, as in the present case it did, to the benefit of such a volunteer, he may well be made liable in an action for money paid for his use. The money in question belonged to Creps, and he alone had the right to say, in the absence of any legal adjudication to the contrary, where it should go. Baird had no right, of his own mere motion, to apply it to the payment of the taxes, and thus disincumber his lands, nor can he find protection in an order procured upon his motion, which the court had no jurisdiction to make, and which has been totally reversed.

In saying this, I by no means wish to be understood as holding that the actor is always liable for the error of the court, committed at his instance; nor do I mean to deny to purchasers, at judicial

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282] sales, the well-known equitable relief *resulting from a marshaling of assets, when the creditor has more than one fund to resort to. This decision is not to be understood as a precedent beyond the facts of the case. This is not a case in which an erroneous decree was rendered on a bill to marshal assets, and in which, upon a reversal of the decree, it would be proper to make the individual receiving the money refund it. It is the case of an order made without authority, at the instance of one who had no right to ask it; by which money belonging to another, and upon which the creditor had no lien, has been applied to discharge an incumbrance upon the mover's estate, which he had no right to compel the owner of the money to remove, and the money thus applied, has gone into the public treasury, and been distributed among the state, county, township, and school district organizations. It is, therefore, quite distinct from the case of a bill to marshal assets. To the maintenance of such a bill, it is indispensable that the creditor have a lien on the several funds out of which payment is to be made. He can not be driven to seek payment out of assets upon which he has no lien, nor is there, even as against the debtor, any equity, cognizable by the chancellor, upon which to found a decree to that effect. But here the creditor had no lien upon the money.

Again, the bill must be preferred to a court having jurisdiction to pronounce the decree sought. But here the court had no authority to make the order in question.

We are therefore of opinion, under all the circumstances of this case, that the right of Cleps, to maintain the action, is as valid as if Baird, in person and without an order of the court, had taken the money and paid the taxes.

One more question remains. Could Cleps maintain his action without an order of distribution directing the money to be paid to him?

It is claimed that he could not, because the statute requires the court to make an order of distribution of the proceeds of the sale of real estate upon execution, and it is argued that until such an 283] order is made, awarding the surplus, after *the satisfaction of the execution to the judgment debtor, he has no property in it. In support of this proposition, we are referred to the case of *Dawson v. Holcombe*, 1 Ohio, 275, in which it was held that money in the hands of a sheriff, the proceeds of a judgment sale of real estate, and in regard to which no order of distribution had been

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made, could not be attached as the property of the plaintiff in execution. The court said: "While the money remains in the hands of the officer, it is in the custody of the law. It does not become the property of the judgment creditor till it is paid over, and consequently is not liable to be attached as his. The writ of attachment could not supersede the execution, or release the sheriff from a literal compliance with its command, which required him to bring the money into court, so that it might be subject to their order. Cases frequently occur in which the right to receive the proceeds of a judgment is contested, and in which the decision of the court is necessary as a guide to the officer."

It is obvious that the case before us is very different from that cited. That was the case of an attachment of the money. This is an action of assumpsit for money paid. There the question was whether the judgment creditor, who might never obtain an order for the money, had an attachable interest in it. Here there was no one setting up any claim to the surplus but Creps. There the sheriff had not brought the money into court. Here he did bring it in. There the sale had not been confirmed. Here it was not only confirmed, but the judgment was ordered to be paid out of its proceeds. There there was no recognition by the court of the creditor's right to the money. Here the surplus was declared, in effect, to belong to Creps, to whom, in the absence of a paramount claim, the statute required it to be paid.

For these and other reasons we see nothing in that decision that militates against the plaintiff's right of action.

When this case was in the district court I concurred, though with serious doubts, in the decision that was made. A more thorough examination than there was opportunity *then to make has [284 convinced me that the decision was erroneous, and of this opinion are my brethren also.

The judgment must be reversed, and a new trial awarded.

Adm'x of Pugh v. Holliday et al.

ADMINISTRATRIX OF LOT PUGH v. THOMAS HOLLIDAY, LEWIS
HOLLIDAY, ET AL.

Upon decree of bankruptcy, all the property of the bankrupt, of every kind and description, passes to and is vested in the assignee.

In an action on a promissory note or bill of exchange, made payable to several payees, one of them having become bankrupt, the assignee in bankruptcy must be a party plaintiff with the other payees, and not the bankrupt himself.

If the bankrupt, before decree, has assigned a chose in the action so as to pass all the beneficial interest to his assignee, suit may be brought in the name of the bankrupt, for the use of the assignee.

When one of the payees has become bankrupt after having transferred his interest in a note to the other payees, suit may be brought in the name of all the payees, for the use of those who were not bankrupt.

When the payees do so unite, and on the trial of the case, after proof by defendant of such bankruptcy, the plaintiffs introduce a paper purporting to be an assignment by the bankrupt to the other payees, bearing date before bankruptcy, the mere fact that the paper bears date before, is not evidence that it was executed on that day, without any other evidence of the time of execution.

ERROR to the district court of Hamilton county.

The district court affirmed a judgment of the Commercial Court of Cincinnati. This petition in error seeks the reversal of both judgments.

A sufficient statement of facts is contained in the opinion of the court.

Storer & Gwynne, and *Pugh & Pendleton*, for plaintiff in error.

Corwine & Holt, and *Morris, Tilden & Rairden*, for defendant in error.

KENNON, J. The original suit was commenced June, 1849, and judgment was rendered in December, 1849, in favor of the defendant in error for over \$19,000

285] *On the trial the plaintiff below offered in evidence, a note of L. Pugh, dated April 22, 1839, payable to the order of Thomas Holliday & Co., at ninety days, for over \$10,000. Also the draft of L. Pugh, dated April 23, 1839, at five months, for \$6,000, drawn on Joseph Landis & Co., with a credit thereon, December 31, 1839, of \$3,630.

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On the trial, Joseph Marks testified that on the 21st of September, 1839, he presented the bill for acceptance, and was answered that it could not be accepted. He then notified L. Pugh, by notice in print and writing, informing him of the protest, and that the holders of the draft looked to him for payment. The fact of his protesting it he does not prove.

On September 26, 1839, he presented the bill for payment and was answered that it could not be paid. He then protested it in the usual form, and according to law, for non-payment, and notified L. Pugh of the *protest* by notice deposited on the same day in the post-office.

This deposition was objected to by the counsel for the defendant, but was permitted to be read, except so much thereof, or such part of the same as undertakes to state the contents of the protest for non-acceptance "in the usual form according to law," which was excluded by the court.

The protest for *non-payment* was read in evidence. Charles Duffield proved, that from 1838 to 1840, Thomas Holliday & Co. were Thomas, William, and Lewis P. Holliday, residing in Kentucky.

The defendant then gave in evidence a record and agreement, showing that the amount of credit indorsed on the bill, was obtained under an attachment of Lot Pugh's property in New Orleans, commenced September 21, 1839, and without his consent.

The defendant below further proved, by W. F. Johnston, and the record in bankruptcy, that William Holliday, of the plaintiffs' firm, took the benefit of the bankrupt law in Kentucky, filing his petition December 21, 1842, and being declared a bankrupt November 11, 1844; that Robert Campbell was appointed assignee in bankruptcy; that a final decree was entered in the case; that [286 William Holliday, in his inventory, dated December 1, 1842, put as part of his property one-sixth of a debt of \$15,000, against Lot Pugh.

The plaintiffs below, as rebutting testimony, then introduced a paper purporting to be an assignment of these claims by William Holliday, dated September 10, 1839. The witness proved the handwriting of William Holliday, but knew nothing of an actual assignment, or the time when the paper was executed by William Holliday.

This is substantially a statement of the case as made in the brief

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of the counsel for the plaintiff in error, and which the counsel for defendant in error says is a correct statement.

It seems that the case in the Commercial Court was tried by the court, and not by a jury. The foregoing statement contains all the evidence which was considered material for a determination of this case. A bill of exceptions was taken setting out the whole of the testimony. After judgment, or the finding for the plaintiffs below a motion was made for a new trial and overruled by the court; to the overruling of this motion plaintiffs in error excepted. The principal grounds for the new trial were, that the finding of the court was contrary to the evidence, and that judgment should have been rendered for the plaintiff in error instead of the defendant in error.

It becomes necessary, therefore, to look into the whole evidence; but without stating the whole, and without deciding whether the court erred in permitting the deposition to be read, or so much thereof as the bill of exceptions shows was read, we will suppose that the deposition was properly admitted by the court, and that the plaintiffs made out in the first instance, and before they rested, a proper case for recovery. The defendant then proved, by evidence which can not be doubted, and the truth of which we apprehend the Commercial Court of Cincinnati did not doubt, that before the commencement of this suit, William Holliday, one of the plaintiffs, petitioned for the benefit of the bankrupt law; that an assignee was appointed, and a final decree in bankruptcy made by the proper court. If no further evidence had been offered, the court could not legally have found for, and entered judgment for the plaintiff, for the reason that William Holliday had no interest in these claims, and could not be made a co-plaintiff with Thomas and Lewis Holliday. The suit should have been brought in the name of Thomas Holliday, Lewis Holliday, and the assignee in bankruptcy. By the third section of the act of Congress, passed in 1841, to establish a uniform system of bankruptcy throughout the United States, it is provided: "That all property and rights of property of every kind and description, whether real, personal, or mixed, of every bankrupt, who shall, by decree of the proper court, be declared to be a bankrupt within this act, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or conveyance whatsoever; and the same shall be vested by force of

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such decree in such assignee as from time to time shall be appointed by the proper court for this purpose."

The mere reading of this section would be enough to show that all the legal and equitable interest of William Holliday in the subject of the suit was vested in his assignee, and that he was totally divested of any interest therein, and could not therefore be a party plaintiff to the suit.

But, under the above-recited section, as well as under a similar section of the English act, it has been uniformly held, both in England and America, that when the bankrupt was a member of a firm, or jointly interested with another in the subject of the action, the suit must be brought in the name of the assignee in bankruptcy, and the remaining members of the firm, or the persons jointly interested in the subject-matter of the action. They become tenants in common, and must unite in the action.

It is wholly unnecessary to cite authorities to support this doctrine. It is not denied by counsel for the defendant in error, in cases where the bankrupt had any interest in the *suit. It [288 is, however, claimed that there are a few exceptions to the rule, one of which is, that when the firm was wholly insolvent (of which, however, there was no evidence in this case). Another is, where the bankrupt had no real interest, but was a mere trustee for another; in which case, it is said, the suit may be prosecuted in the name of the bankrupt for the use of the beneficiaries of the trust, and that it is not proper to bring the suit in the name of the assignee in bankruptcy. And, although there are some decided cases the other way, yet the weight of authorities is in favor of this exception, and there are some good reasons why it should exist. Chitty on Pleading, 28, says: "Where the bankrupt, prior to his bankruptcy, has assigned over his beneficial interest in a chose in action to a third person, the action must be brought in the name of the bankrupt, and not of the assignee." And so are the English authorities, and such we take the law to be in this country, notwithstanding the strong language of the act of Congress; for there would seem to be no good reason to require the assignee to sue where he had no beneficial interest, and could take no benefit by the judgment.

The defendant in the Commercial Court, rightfully claiming that if William Holliday was improperly joined as one of the plaintiffs (when the assignee should have been the proper person to sue), no

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judgment could be rendered against him, proved the bankruptcy of William Holliday.

The plaintiffs in the commercial court, in this state of the case, undertook to prove that *before* William Holliday became bankrupt, he had transferred all his beneficial interest in the note and draft to Thomas and Lewis Holliday, and that William was a naked trustee for Thomas and Lewis Holliday, and that therefore he might be properly joined in the action with the other two payees for their use. We think that if the plaintiffs had succeeded in establishing the fact of the assignment *before* the bankruptcy, they were the proper plaintiffs, and could have recovered in the name of William, Thomas, and Lewis, for the use of Thomas and Lewis; and that such recovery would, if such assignment had actually 289] been made, *have been a protection to the defendant against any other suit in the name of the bankrupt's assignee.

The question therefore is, was there *any* evidence—legal evidence—showing that William had made such assignment *before* he became bankrupt?

A paper was introduced by the plaintiffs purporting to be an assignment, dated September 10, 1839, and a witness testified that the signature to that paper was in the handwriting of William Holliday, but knew nothing more about the matter. Is the paper thus proved to be executed by William any evidence that it was executed on the 10th of September, 1839, before he became bankrupt, and before the passage of the bankrupt act?

The *time* at which this instrument was executed becomes a very material question. Admitting the execution of the paper, and that it passed all the interest which William had at the time of its actual execution, still the question is, does the paper itself prove that it was executed on the day on which it bears date? It often becomes material on the trial of a case founded on a promissory note to determine when it was assigned, whether before or after it became due; if after it become due, the law allows the defendant or maker to set up many defenses against the assignee which he could not make if assigned before it became due. In such case, the law presumes that the assignment was made on the day of the *execution* of the note. The reason, however, of such presumption is founded on the commercial character of the paper; the indorsement transfers the legal title to the assignee, gives him a right of action in his own name, and the holder is not presumed to take the paper,

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clogged with equities and set-offs, which may render it of no value in his hands; hence the presumption that the assignment was made before duo.

In this case, the instrument signed by William does not transfer the legal title. It is not an indorsement on the note itself, but on a separate piece of paper, to which the defendant's intestate is no party, and of which he is not presumed *to have any knowl- [290] edge. The paper is produced as evidence to rebut a perfect defense, made out by the defendant; it is a private paper, made by the plaintiffs themselves, interested in the event of the suit, without which they must fail in the action; a paper which might be executed and *dated* at any time the parties chose, without a violation of any criminal law. The date is a most material part of the paper; and how much better evidence is it of the fact that it was executed on the day on which it bears date than would be the declaration of the parties themselves? Is it anything more than such declaration? The paper may be all right, but we think that to make a paper executed by the plaintiffs themselves evidence that it was made on the day on which it bears date, would be to allow the parties to make a case by their own declarations.

The case of *Baker et al. v. Blackburn*, 5 Ala. (new series), 417, is a case almost precisely in point. It was an action of trespass by the plaintiffs in error. Upon the trial, the plaintiffs, to prove their right to maintain their joint action, offered in evidence the copy of a deed which bore date previous to the commencement of the suit, having laid the foundation for such secondary evidence. There was proof that the original deed was in the handwriting of the plaintiff, and purported to convey the *locus in quo*. The court refused to permit the copy to be read; to which the plaintiffs excepted, and assigned that for error. Judge Ormond, in delivering the opinion, says: "In this case, the deed offered in evidence purported to convey an interest in the land from one of the plaintiffs to the other, and was the evidence of their right to maintain the action in their *joint* names; to which deed the defendants were neither party nor privy. This was, in effect, an attempt to prove a fact by the declaration of the party in whose favor it was offered."

In the case of *Meldrum v. Clark*, in error, found in 1 Morris (Iowa), 130, the same principle was decided.

In that case, the plaintiff in the court below, declared against

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the defendant in covenant. The declaration shows *that the [291 defendant, in consideration of having been paid for two certain tracts of land by plaintiff, bound himself to make a deed to the plaintiff for the same, so soon as defendant obtained a deed from the government. The defendant was in possession of the land, under a pre-emption claim. The defendant further bound himself, that if he sold his claim, he would take a bond from the purchasers, binding him to convey to the plaintiff that portion of the land which the defendant had sold to plaintiff. The breach assigned was, that defendant had sold his claim, but had not taken a bond from the purchaser to make title to plaintiff.

The defendant put in a plea of performance. On the trial, the defendant offered in evidence, a bond taken from the purchaser, bearing *date* prior to the suit being brought against him, but offered no evidence to show that such bond was actually executed before suit brought. The plaintiff contended that the *date* of the bond was not *prima facie* evidence of its *real* date, and the court below, in substance, so charged the jury. The question was, whether the court below were right in the charge. Chief Justice Mason, in sustaining the opinion of the court, says: "The main point in the case, is that in relation to the date of the bond purporting to be taken by Meldrum from the person to whom he sold; performance had been pleaded, and to sustain this plea, a bond was offered in evidence, dated anterior to the commencement of the suit. The time of the execution of the bond becomes a material fact. And how was this fact proposed to be proved? By the date of the instrument itself, to which Clark was neither party nor privy. There is no doubt, but as between parties to the instrument, this date would raise a legal presumption of the time of its execution. It amounts to a mutual admission, in such a shape as to become legal testimony, but to permit the defendant and a third person to make evidence between themselves that shall bind the plaintiff, without his consent or knowledge, would be overthrowing one of the fundamental and most salutary rules of evidence.

292] *"Suppose the bond had been without date, and that subsequently the parties thereto had, under their hands and seals, executed a separate instrument, declaring the bond to have been executed on a particular day: would this have been competent evidence against Clark? If this would be evidence, why not all the evidence in the case be manufactured in the same way?"

See also the opinion of Slidell, J., in *Murray v. Gibson*, 2 La. 313.

There are indeed many cases in making title, in which the deed would be evidence of the time of its own execution, but this, we think, is not one of those cases. The counsel for the defendants in error, have furnished us with no authority on this point. They say, however, that neither the date of the note, nor draft was proved, but it must be remembered that those papers were executed by the defendant's intestate, and that he put the dates to those papers. But this assignment was executed by the plaintiffs. They made it, and no evidence was offered to show that they had ever had possession of it, until offered in evidence at the trial.

There were several other grounds upon which a reversal of this judgment is claimed, one of which is, that the deposition of Marks, offered in evidence, ought to have been ruled out. We think that deposition was properly admitted, after striking out the part which was rejected by the court. We think the word "protest," in its popular sense, does not mean the paper only, but when a witness says the defendant was duly notified of the protest, he means the demand and refusal to pay. It is, however, unnecessary to consider this point, as we think there was no evidence before the Commercial Court of Cincinnati, that the assignment was made before decree of bankruptcy, and that the plaintiffs were not entitled to recover; and, in coming to this conclusion, we do not mean to say that the *fact* of such assignment, and the time when made, may not be shown by the plaintiffs. If such fact, as a fact, were proved, the plaintiffs, so far as that point is concerned, would be entitled to recover.

*The judgment of the district court, and the Commercial Court [293] is reversed, and the case remanded to the court of common pleas for further proceedings.

DANIEL H. GATES AND JOHN GOODNO v. THE STATE OF OHIO.

The general rule established by "an act defining the jurisdiction and regulating the practice of probate courts," is that prosecutions shall originate in a proceeding before some officer who can hear testimony and decide upon its sufficiency, to put the accused on his defense before the probate court.

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Such a proceeding before an examining magistrate is necessary to confer jurisdiction on the probate court, of all charges which may be brought before it, unless the "act to prevent the adulteration of alcoholic liquors" (Derby's Swan, 479a), has made a particular exception in respect of the offenses it defines.

(Whether such an exception can be made. *Quære*, by Warden, J.)

The jurisdiction being conferred, the information takes the place of an indictment, and, within the limits in which an indictment may vary the charge, and still subject the accused to the consequences of a default on his recognizance taken by a magistrate, the information may vary or depart from the charge set forth in the transcript or recognizance.

WRIT of error to the court of common pleas of Gallia county, reserved by the district court of that county.

The facts and questions are fully given in the opinion of this court.

A. Cushing, for plaintiff in error.

Attorney-General, for the state.

WARDEN, J. In the exercise of a jurisdiction, since taken away (compare section 5 of "an act to amend 'an act relating to the organization of courts of justice and their powers and duties,' passed February 19, 1852," 3 Curw. 1705, with section 1 of an act to amend said section 5 of the act first cited, Swan [Derby's ed.], 263), the court of common pleas of Gallia county, affirmed a judgment of the probate court on an information against the plaintiff in error, for assault and battery, brought into the court of common 294] *pleas by a writ of certiorari. To reverse this judgment of affirmance, the plaintiffs in error sued out of the district court a writ of error to the court of common pleas, and the questions thus arising were reserved for decision here.

Only one of the assignments of error will be noticed, our opinion upon that being conclusive.

The original case was not brought into the probate court by filing a recognizance and transcript, as provided in section 30 of "an act defining the jurisdiction and regulating the practice of probate courts." Swan (Derby's ed.), 751. It was commenced by the filing of an information by the prosecuting attorney, on which issued a warrant signed by the probate judge, under the command whereof the plaintiffs in error were, for the first time, taken into

custody, to answer the charge preferred against them. Did the probate court acquire jurisdiction by these means?

By section 29 of the probate act, it is provided, that "the several probate courts in this state shall not have jurisdiction of any crime, offense, or misdemeanor, the punishment whereof is capital, or by imprisonment in the penitentiary," nor of certain specified offenses, "but they shall have exclusive cognizance of all other crimes, offenses, or misdemeanors, unless otherwise provided by law." Among these *other* offenses, is that charged by this information.

The next section requires all transcripts and recognizances, within the jurisdiction of the probate court, to be returned forthwith by the officer authorized to examine and commit or recognize.

Section 34 reads: "In no prosecution for crimes, offenses, and misdemeanors, cognizance of which is by this act conferred upon probate courts, shall an indictment by a grand jury be required; but in all criminal cases brought before the probate court by filing a recognizance and transcript, as hereinbefore provided, the probate judge shall immediately give notice to the prosecuting attorney of his county, of the pendency of such cause; and such prosecuting attorney shall immediately file with said probate court an information setting forth briefly, but distinctly, in plain and ordinary language, the charge against the accused person, on which charge such person shall be tried." [295]

By section 60 the probate judge is empowered "to issue all warrants, attachments, and other process, and all notices, commissions, rules, and orders, not contrary to law, that may be necessary and proper to carry into effect the powers granted to him."

These are the only *general* provisions of law on the subject of prosecutions by information, which relate to any question of jurisdiction. It is plain that they contemplate no power in the prosecuting attorney to put a party to trial for crime, at his mere discretion, by the filing of an information, which may have no foundation in testimony, but may proceed from his own mere conjecture or suspicion. Nor do they provide for any showing to him, by testimony, on which he is to proceed; or any to the court, as a foundation for its order that an information be filed. The definition of the jurisdiction of the probate court is broad enough to take in the original cognizance of a charge, by proper process, resulting in an order to file an information, in a case wherein no examination by a justice of the peace, or other officer, has previously been made;

but the limitations within which the exercise of that jurisdiction is confined by the probate act, do not include any power to act in a criminal case, except upon the transcript of a justice, or other examining officer. The provision for "warrants," contained in the sixtieth section, like that for attachments in the preceding section, is, apparently, made to vest the court with ample powers to issue all process which may possibly become necessary; but it cannot enlarge the limitations referred to.

The general rule, then, established by the probate act, seems to be, that prosecutions shall originate in proceedings before some officer, who can hear testimony, and decide upon its sufficiency to 296] put the accused on his defense before *the probate court. It is a wholesome rule. If it can be departed from in any case, the exception should be well guarded. Such an exception is made, or attempted, in "an act to prevent the adulteration of alcoholic liquors," passed May 1, 1854, Swan (Derby's ed.), 479a. The seventh section of that act provides as follows: "Prosecutions for violations of the first section of this act, shall be commenced by information, filed in the probate court of the proper county, by the prosecuting attorney thereof; which information may be filed without a previous examination before a magistrate, and the proceeding, after the filing of the information, shall be the same as in other criminal cases in the probate court." Without pausing to inquire whether this exception is guarded as it should be, or can have any legal effect whatever, it may be remarked, that here is a plain legislative construction of the general probate act, in harmony with that which this court has adopted. No such words as those contained in the clause of the last-cited section—"which information may be filed without a previous examination before a magistrate"—would have been chosen, had not the legislature recognized the general rule, as we have supposed it. Such a clause would have been superfluous, had any other construction prevailed.

A loose provision of an act, akin to that last mentioned, has been supposed to establish another exception to the rule. Section 11 of "an act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio" (Swan, Derby's ed. 898b), enacts "that all prosecutions under this act shall be in the name of the State of Ohio, and shall be commenced upon a written complaint under oath or affirmation before any justice of the peace of

the county in which said offense was committed, or mayor of any incorporated town, village, or city, *or by information or indictment, as may be provided by law for the prosecution of offenses, the punishment of which is not capital, or imprisonment in the penitentiary.*" Passed on the day when the act to prevent the adulteration of liquors became a law, and relating *to the same general sub- [297] ject, it might be thought that this act was designed to make a second exception to the rule requiring informations to be supported by the action of an examining magistrate; but a careful examination will show that no such construction is necessary, and the very consideration that it would establish a needless exception to a wholesome rule forbids it, if the words will allow the opposite meaning to be supposed. It refers to the rule which may be applied to the prosecution of "offenses" (not some offenses, or one offense, but offenses in general) "the punishment of which is not capital, or imprisonment in the penitentiary." The words, "*as may be provided by law,*" etc., seem to be used out of caution, and point to the future rather than to the present, as plainly appears from the whole act. If the construction is doubtful, we resolve the doubt in favor of the rule, not the exception.

But if we should otherwise construe the section last referred to, it would still be obvious that the only departures from the general policy on this subject, are in two acts of a kindred nature, defining offenses, none of which belonged to the grade of felonies at common law. And it is important to observe that the offense charged in this information is, by the probate law, brought within the same rule of prosecution, as some offenses which were felonies at common law; and that there is just as much power to try the latter on the mere information of the prosecuting attorney, as to prosecute for assault and battery without a previous examination of the charge by a magistrate. Now, it can hardly be contended, that our law has intended to subject a citizen to a trial for larceny, or the like, on the mere accusation of an officer, who can not, if he would, take testimony on which to support the charge, till he brings the case to trial. No such power was conceded to any officer of the English law. Informations lie (in England) for misdemeanors only; they would not support a conviction for treason or felony. 1 Chit. Cr. L. 844. And even in the cases to which informations are appropriate, the attorney-general alone, or, in case his office *be vacant, [298] the solicitor-general can file an information, *ex officio*, and of his

own mere motion. The following observations, taken from Chitty's Crim. Law, 843, may be read with profit, while we are considering the policy of the law on this subject: "Informations for offenses more immediately affecting the king, his ministers, or the state, were filed, *ex officio*, by the attorney-general, while those in which a private individual was the virtual prosecutor, were placed on record by the king's coroner, or master of the crown office. But these proceedings, though legal in themselves, became the engines of tyranny in the hands of arbitrary princes. The court of star chamber, in which the members were sole judges of the law, the fact, and the penalty, was used in the reign of Henry VII., by Empson and Dudley, his corrupt and favorite ministers, as the engine of oppression to the subject, and of unjust emolument to the crown. During the prosperity of this oppressive tribunal, the common-law authorities of the king's bench fell into disuse, as being too feeble to satisfy the rapacity of ministers, or the avarice of the sovereign. But when, by 15 Car. 1, chap. 10, the star chamber was finally abolished, the ancient power of the attorney-general and master of the crown office in filing informations, began to revive. At this time, both these officers had the power of thus accusing the subject at their discretion, which the attorney-general at present enjoys. Immediately after the revolution, therefore, a further reformation took place, and by the statute of 4 and 5 Wm. & Mary, chap. 18, the coroner was reduced to a mere ministerial officer, and the information exhibited by him in the crown office, subjected entirely to the control of the king's bench, in that way which we shall presently examine. The attorney-general is not at all affected by this provision, and his authority remains in the same condition as before the statute was enacted."

By the statute 4 and 5 William and Mary, no proceeding by information can be allowed without leave of the court. The first step is to file affidavits, satisfying the court of the probable guilt of 299] the accused, the innocence of the accuser, *his character and motives, and the like—all of which the court will take into consideration "before they lend their sanction to this extraordinary mode of prosecution." Next follows a rule calling upon the defendant to show cause why leave should not be granted to file an information against him; which rule being served, the accused may meet the charge by counter affidavits. The court, having examined the affidavits and heard the arguments, openly pronounces a decision, dis-

charging the rule or making it absolute. If the rule be made absolute, the party who has thus far succeeded must enter a recognizance to prosecute. *Ib.* 862, 863.

All this caution but illustrates the observation of Sir Matthew Hale, "That in all criminal causes the most regular and safe way, and most consonant to Magna Charta, *cap.* 29, 5 E. 3, *cap.* 9; 25 E. 3, *cap.* 4; 28 E. 3, *cap.* 3; and 42 E. 3, *cap.* 3, is by presentment or indictment of twelve sworn men." And so sensible is the English public of the impropriety of subjecting any one to accusation at the mere will of another, howsoever high the place or trust he holds, that even the attorney-general, though he *may* file an information against any one whom he thinks proper to select, without oath, without motion, or opportunity for the defendant to show cause against the proceeding, generally pursues this course on grounds laid before him by affidavits of witnesses. And he seldom informs except in such cases as are of notorious occurrence.

In many of the states of this Union, constitutional provisions limited or discountenanced informations; in one, no information would lie where an indictment could be found.

Taking these things into review, how are we to understand the provision of our present constitution which is thus expressed: "Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital or otherwise infamous crime, unless *on presentment or indictment [300 of a grand jury." Is it here contemplated, that all the caution of our law in protecting the citizen from needless, unfounded, or malicious accusation, and that shame which is almost inseparable from the idea of a public trial on a charge of crime, is to be wholly abandoned? I can not so regard it. It is familiar that the grand jury has often been objected to as inquisitorial, and its secret proceedings denounced as analogous to those of the star chamber; but this objection does not indicate any popular disposition in this country to vest in any officer, in any one man, the power so odious in England. I can not suppose the convention who framed, or the people who adopted, the constitutional provision cited, to have intended any such startling change as to take away all the safeguards of the citizen against groundless accusation or vexatious and oppressive trials for imputed crime. I do not believe that a prosecuting at-

torney, elected as he is to be the advocate of one side in such accusation or trial, was ever supposed to be a fit person to determine, in his own mere discretion, who shall be prosecuted, and *ex officio*, to file informations on which convictions for larceny, or the like, may be based. That no such dangerous investment of power in a prosecuting officer was ever *contemplated* by those who adopted the constitution, seems to be very certain. Nor do I think it was *purposed* to allow the court, charged with the duty of trying the case finally, and pronouncing judgment thereon, to act in the first instance, as courts in England do, in ordering informations to be filed. Something repugnant to our habits, and to our notions of judicial freedom from bias or partiality, runs through the whole of the practice in deciding upon testimony taken to show cause why an information should not be filed. We do not expect to find in the same person an examining magistrate and a court authorized to give final judgment. We do not hope to find a man who can well discharge his duty in both these capacities. Plainly, I think, none of these things were intended. The general rule adopted by the legislature appears to me to be all that was ever contemplated by those in 301] *any manner concerned in framing or adopting the constitution. Whether I would go further, and say that any departure from that rule is so *forbidden* by the constitution as to be beyond the legislative power, it is unnecessary here to declare. But I feel very certain that I am on safe ground when I deny that it was ever intended to allow any such departure.

In all that I have said as to the construction of the constitutional provision, I speak but for one member of the court. But in the conclusion that, unless a single exception has been made by a particular statute, the rule established by the probate act requires all cases to brought into the probate court by the transcript of some examining magistrate, I express the opinion of the whole court.

It may be necessary to guard this decision from misconstruction in a single particular. We do not mean to deny to the prosecuting attorney power to vary the terms and nature of the accusation contained in the transcript, to the same extent as he might do in an indictment, without discharging the recognizance of the accused. Nor is the right to amend informations to be in the least circumscribed by this opinion. Such a right must always be limited to an accusation founded on the same facts as those on which the original information rested; and this decision is consistent with that

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right to the full extent in which, as we understand the law, it might have been enjoyed, had this ruling never been made. All we say is: "A proceeding before some examining magistrate is necessary, in a case like that before us, to confer jurisdiction on the probate court. That jurisdiction being conferred, the information takes the place of an indictment, and within the limits in which an indictment might vary the charge, and still subject the accused to the consequences of a default on his recognizance, the information may vary or depart from the charge set forth in the recognizance or transcript.

This conclusion compels us to reverse the judgment of the court of common pleas and the probate court.

***JOHN SELSER, EXECUTOR OF SAMUEL BRIGGS, DECEASED, v. [302
EVAN BROOK.**

Usury, in this state, will not vitiate the entire contract on the part of a surety on a promissory note, but only render the note voidable to the extent of the illegal consideration.

Where a joint and several promissory note in blank is signed by several persons as sureties, and delivered to the principal debtor, to be by him filled up and given to the payee, if an illegal rate of interest be agreed upon between the principal debtor and the creditor, and incorporated in the amount for which the note is made payable, the contract is voidable to the extent of the usury only, and creates a binding obligation on the part of the surety for the principal and legal interest, whether the usury be inserted with the knowledge and consent of the surety or not.

If, with the *knowledge or assent* of the creditor, any material part of the transaction between the creditor and the principal debtor be misrepresented to the surety, the misrepresentation being such, that, but for the same having taken place, the suretyship would not have been entered into, the security so given is voidable at law, on the ground of fraud.

But where a fraud is practiced by a principal debtor in procuring a surety to sign a note without the knowledge of the creditor, the obligation of the surety is valid and binding.

A surety, in signing his name to a promissory note below or after the names of other persons have been placed on the note as co-sureties, although he does not thereby warrant, does, in effect, affirm the genuineness of the previous signatures, and can not avoid his liability to the payee, by showing

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that they had been forged to the note by the principal, but of which the creditor had no notice.

Where one of two innocent persons must suffer by the fraud of a third person, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong, must bear the loss.

PETITION in error to reverse the judgment of the district court of Clark county.

The original action was assumpsit on a promissory note, as follows:

"\$1,100.

March 6, 1850.

"Twelve months after date, we, or either of us, promise to pay Evan Brock, or order, eleven hundred dollars, for value received.

"MARTIN L. CAR,
"DANIEL HORNEY, SR.
"JOSEPH THOMAS,
"WILLIAM ANDERSON,
"SAMUEL BRIGGS."

303] *The plea was the general issue, verified by affidavit. On the trial in the district court before a jury, the plaintiff, to maintain the issue on his part, gave in evidence, among other testimony, the note above mentioned. And the defendant, on his part, among other things, gave evidence tending to prove that Martin L. Car was the principal on said note, and Samuel Briggs, if a party to the same at all, was only surety; that his name was affixed to it when the note was in blank, and after the names of the other persons appearing on the note had been placed there; that the body of the note, leaving the amount in blank, was written by one James Edwards at the instance of the plaintiff and said Car, and in the absence of all the other persons whose names appear on the note. The defendant also gave evidence tending to prove that the signatures, purporting to be those of William Anderson and Daniel Horney, Sen., on said note, were not genuine. And the plaintiff, in rebutting, gave evidence tending to prove that prior to the note being written in blank, he and said Car had settled, and that on the settlement Car had been found to be indebted to the plaintiff in an amount exceeding one thousand dollars; and that plaintiff proposed to give Car a credit of one year for one thousand dollars, with ten per cent. interest on his paying the balance, and giving a note, with security, for that amount; that Car accepted the prop-

position, paid the balance, and the note being drawn in blank, and the names affixed to it, was subsequently filled by "eleven hundred dollars" being inserted, making the amount of one thousand dollars, with ten per cent. interest thereon for one year; Briggs not being present at the time of the agreement between the plaintiff and Car at the filling up of the note. And there was no evidence given tending to show that Briggs had assented to the agreement, or the filling up of the note, other than that of his signature appearing on the note.

During the progress of the trial the defendant asked the court to charge the jury that if they found, from the evidence, that Briggs signed his name to said note, as surety for Car, *prior [304 to the date thereof, and while the same was in blank and that without the assent of said Briggs, Car and the plaintiff agreed to cause said note in blank to be filled up for a loan, or credit of one thousand dollars, at a greater rate of interest than six per centum per annum, and that the same was accordingly so filled up, that the defendant was not liable on the note, and that their verdict should be for the defendant. The court refused to give the charge requested; but on the contrary, instructed the jury that if they found the facts as claimed, the plaintiff's right of recovery would be limited to one thousand dollars, and six per cent. interest thereon.

The defendant further asked the court to instruct the jury that if they found that Briggs signed the note in blank as surety only, and after the names of Horney and Anderson had been written thereon, and on the faith and understanding that the names of said persons on said note were their genuine signatures; and should further find that Brock knew Briggs to be surety only at the time he received the note; and also find that the signatures of Horney and Anderson had been forged upon the note, that in such case the defendant would not be liable, and that the verdict should be in his favor. The court also refused this charge, as requested; but on the contrary, instructed the jury that the note being several as well as joint, if Briggs was only surety, and Brock knew the fact, and the names of Horney and Anderson were forged on the note, it would afford no defense to Briggs, unless notice of such forgery were traced to Brock at or before the filling up of the note.

To this ruling and these instructions of the court to the jury, and the refusal of the court to charge the jury as requested, the

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defendant, by his counsel, excepted. And upon the ground presented by the bill of exceptions, this petition in error has been filed.

Harrison & Rush, for plaintiff in error

White, for defendant in error.

305] *BARTLEY, J. The questions for determination in this case, arise upon the exceptions to the charge of the court to the jury, and are as follows:

1. Whether the liability of Briggs, on the note, was defeated by the agreement of Car and Brock, incorporating an illegal amount of interest in the amount for which the note was made payable?

2. Whether the liability of Briggs to Brock could be invalidated by showing a fraud on the part of Car, in forging the signatures of Horney and Anderson on the note, of which it does not appear that Brock had any knowledge at the time he received the note?

Of these in their order.

I. The effect of usury in this state, according to the course of adjudication for many years, is not to vitiate the entire contract, but only to the extent of the usury. The consideration may be inquired into for the purpose of showing illegal interest and avoiding the agreement to this extent, but no further. And where usury is shown, a recovery may still be had upon a contract for the principal and six per cent. interest. *Lafayette Benefit Society v. Lewis*, 7 Ohio, 80. *Rains et al. v. Scott*, 13 Ohio, 107. The obligation of Briggs being that of a surety, was accessory to the obligation of his principal. And usury will not avoid a contract as to a surety beyond the extent to which it is vitiated as to the principal.

It is claimed, on behalf of the plaintiff in error, that as the note was signed in blank, and Briggs a mere surety, whose liability could not be extended by implication, Car, in filling up the note with an amount which included illegal interest, exceeded his authority, and thereby discharged the liability of Briggs. The fact that the note was signed in blank, and filled up afterward, could not affect the liability of Briggs. Car had agreed to give Brock a note with security for one thousand dollars, at ten per cent. interest on a year's credit. The note having been signed in blank, was delivered to Car, to be filled up without any special restrictions as **306]** to the terms or amount. Briggs thus reposed full confidence in and gave ample authority to Car to fill up the note, and when

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filled up, it became obligatory upon him to the same extent it would have been if filled up before it was subscribed. But having been given before the enactment of the statute of 1850, fixing the conventional rate of interest at ten per cent., the stipulation for the excess of interest over six per cent. was void, and the legal effect of the instrument was to create an obligation for the payment of the one thousand dollars with six per cent. interest. Whatever Car may have attempted to do, whether within the scope of his authority or not, he did not, in reality, create any legal obligation beyond the extent of the principal with the legal rate of interest. Car had the capacity to make the contract, and the authority to fill up the note; and if he exceeded his authority by stipulating for an illegal rate of interest, his act, to the extent of the usury, was void, and to this extent created no obligation, and could be avoided *pro tanto*, by either himself or Briggs, by showing the fact, on any attempt to enforce the collection of the note.

In the case of *Violet v. Patton*, 5 Cranch, 151, Chief Justice Marshall said: "That the objection that the indorsement preceded the making of the note, comes with a very bad grace from the mouth of the indorser. He indorsed the paper with the intent that a promissory note should be written on the other side, and that he should be considered as the indorser of that note. It was the shape he intended to give the transaction; and he is now concluded from saying or proving that it was not filled up when he indorsed it."

The plaintiff in error refers us to the case of *The Bank of Chillicothe v. Swayne et al.*, 8 Ohio, 286, and also the case of *The Preble county Bank v. Russell*, 1-Ohio St. 320. The principle settled in those cases has no application here. In each of those cases the contract was declared void, not because of any illegal element or stipulation entering into the consideration of the instrument, but for want of *legal capacity* on the part of a corporation to make a contract in derogation of the authority conferred by its charter, being the law of its creation.

*II. Could the liability of Briggs be affected by showing a [307 fraud on the part of Car in forging the names of Horney and Anderson to the note?

If there was any *participation* in the fraud on the part of Brock, the creditor, in relation to the obligation of the surety, or if the fraud was perpetrated by the principal debtor, with the *knowledge* or *assent* of Brock, the liability of the surety would clearly be dis-

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charged. In the case of *Stone v. Compton*, 5 Bing. (N. C.) 152, Tindal, chief justice, said: "The principle to be drawn from the cases, we take to be this, that if, *with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is voidable at law on the ground of fraud.*" The same doctrine is recognized in the case of *Graves et al. v. Tucker*, 10 Smedes & Marshall, 22.

In the case before us, the charge of the court was, that although Brock knew the relation of Briggs to be that of surety, yet that the fraud would afford no defense to Briggs, unless notice of the forgery were traced to Brock at or before the filling up of the note. We do not perceive any error in this instruction to the jury. Briggs, by subscribing his name to the note in blank, gave credit to Car, and authorized any person who might legally become the holder of the instrument, to trust Car, on his accountability, to any amount for which Car had authority to fill up the note. Briggs, by reposing this confidence in Car, and delivering to him the note with his name to it, placed it in the power of Car to procure credit with other persons on the faith of his (Briggs') liability. In the case of *Russell v. Langstaff*, Douglass, 516, Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum; and that it does not lie in the mouth of the indorser to say 308] that the *indorsement was irregular." It was incumbent on Briggs, when he placed his name to the note, to ascertain and know whether those whose names appeared on the note as his co-sureties had signed the note and become legally bound. And by signing his name on the instrument, after the names alleged to have been forged, although he did not thereby *warrant*, yet he did distinctly *sanction* and *affirm* the genuineness of the previous signatures. If, therefore, a fraud were practiced on Briggs, to which Brock was not a party, and of which he had no knowledge at the time, but perpetrated by a person in whom Briggs had reposed special confidence, and to whom he had given the credit of his name, it was his misfortune, not Brock's fault. It appears to be well settled, both by reason and by authority, that where one of two innocent persons must suffer by the fraud of a third person, he

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who trusted the third person, and placed the means in his hands to commit the wrong, must bear the loss. *Lickbarrow v. Mason*, 2 Term, 70; *Lane v. Borland*, 2 Shepley, 77; *Root v. French*, 13 Wend. 572. The wrong here was one which Briggs' vigilant regard for his own interest and safety could and should have avoided. In the case of the *Bank of St. Clairsville v. Smith et al.*, 5 Ohio, 222, the Supreme Court of this state held that when a loss must be sustained by one of two persons, through the fault of a third party, in passing negotiable paper, he who reposed the first confidence must bear the ultimate loss.

The relation between a surety and the holder of a promissory note is, in many respects, similar to that which exists between the indorser and the holder; and we learn from *Story on Promissory Notes*, 153, that the obligations which exist between the indorser and every subsequent holder of a promissory note, is similar to that which exists between the drawer and the payee of a bill of exchange. And one of the consequences of the doctrine that a negotiable instrument, after indorsement, will pass by mere delivery, is, that if it should, after indorsement, be lost or stolen, or fraudulently misapplied, any person who should subsequently *be- [309 come the holder of it, *bona fide*, for a valuable consideration, without notice, would be entitled to recover the amount thereof, and hold the same against the rights of the owner, at the time of the loss or theft. This arises from the peculiar rights and obligations of negotiable paper, and the nature of the functions which it performs in commercial transactions. There is, therefore, great justice and propriety in the rule, that the payee or indorsee of negotiable paper takes it free from any of the conflicting equities existing between the several makers or obligors, of which he had no notice.

Petition dismissed, and the judgment of the district court affirmed.

THE STATE OF OHIO v. THE EXECUTOR OF JOEL BUTTLES.

When any officer or agent of the State of Ohio, charged by law with the custody and disbursement of public money, delivers any part of it to a private person or a corporation, for use, to be repaid with interest at a future time, though the bond or other instrument evidencing the obligation to re-

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pay may denominate such disposition of the money a "deposit." it is nevertheless in substance and legal effect a loan, which, upon its face, establishes the relation of borrower and lender.

The policy of this state, in view of all our statutes regulating the collection, safe-keeping, and disbursement of the public money, has always been to prohibit its officers and agents from loaning or dealing in its funds, on public or private account; a few exceptions, where officers have been authorized by special statutes to loan or otherwise improve particular funds, only make the general rule the more manifest.

Under the act of March 23, 1840, "to regulate the receipt and disbursement of the canal fund;" the act of March 10, 1843, "to reorganize the board of canal fund commissioners;" the act of March 2, 1846, "to prescribe the duties of the board of public works, canal fund commissioners," etc.; and the act of the same date, "to punish the embezzlement of public moneys, and for other purposes," there is not only no authority given to the fund commissioners to loan moneys under their control, but they are expressly prohibited from doing so, and for a violation of duty in this particular, they are liable to the penalties provided in the second section of the act of 1846.

It follows that the loan made by the fund commissioners to the principal of the defendant's testator was wholly unauthorized, and that the state was not, at the time the contract was made, bound by it. She could only make 310] *herself a party to the contract, and claim its benefits, and become subject to its restrictions, in the same manner as a private individual, in case of an unauthorized contract by an agent.

When the state appears in her courts as a suitor, to enforce her rights of property, she comes shorn of her attributes of sovereignty, as a body politic, capable of contracting, suing, and holding property, subject to those rules of justice and right, which, in her sovereign character, she has prescribed for the government of her people.

In our statutes prohibiting the agents of the state from lending its money, there is nothing intended to relax the ancient and salutary maxim, that *ex turpi causa non oritur actio*; but this rule can not be applied to annul contracts made by an agent in the name of his principal, without authority, or in disobedience of the principal's orders; as it would thus violate the well-established doctrine, that the principal may subsequently ratify such unauthorized acts of his agent, and become entitled to all the benefits, and incur all the obligations of the contract, "as fully, to all intents and purposes, as if he had originally given his direct authority in the premises, to the extent which such acts, doings, or omissions reach."

Contracts *contra bonos mores*, forbidden by positive law, or opposed to public policy, are void, and can neither be ratified nor enforced; but where a statute prohibits an act under penalty, and that is the only illegality claimed, the whole statute must be examined to ascertain whether the legislature intended that contracts made in violation of it should be avoided. The principle does not extend to the avoidance of contracts made by an agent

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which his principal could lawfully have made, and which have been notified by him, although the agent, for his excess of authority may be subjected to punishment.

Applying the doctrine to the statutes in question, their whole object, spirit, and design are preserved, when they are made operative between the state and its agents, in deterring the latter from the interdicted use of the public moneys; and by no fair construction, can they be held to operate upon unauthorized contracts for the use of such moneys, so as to prevent the state from claiming the benefits of their provisions, should she deem that the most feasible mode of replenishing the public treasury.

The option belongs to the state, whether she will or will not make herself a party to the unauthorized contracts of her agents, and does not belong to those who have not been, and could not be injured by such contracts.

When the state becomes a party in court, suing upon such a contract, without any suggestion that the suit is prosecuted without authority, the presumption, as in like cases of private individuals, is that she has ratified the contract.

The general assembly, however, having the exclusive power to make a loan, it requires no less power to ratify a contract for such loan, made by the agents of the state. No officer or agent can so ratify, because they not only have not the authority for, but are expressly prohibited from, making the contract.

*From the time of ratification, the state loses all remedy against her un- [311 faithful agents; and this remedy can not be released, nor the benefits of the contract acquired, without the action of that department of government invested with the power, under the constitution, of disposing of the property of the state.

Such a contract may be ratified by the legislature, without a public law for the purpose, and by proceedings of which this court can not take judicial notice.

COVENANT; reserved in the district court of Franklin county, into which court the action had come by appeal.

The action was on a joint and several bond, executed December 31, 1849, by Elias F. Drake, Demas Adams, Jun., Thomas Moodie, William Miner, Joseph Whitehill, Demas Adams, John Graham, and the defendant's testator.

The declaration avers that on the 31st of December, 1849, the commissioners of the canal fund of the State of Ohio, with a view to the redemption of a portion of the seven per centum stock of the state, and to the increase and advancement of the canal fund, at the instance and request of the defendant's testator, Joel Butties, and of the other parties named, deposited with the Columbus Insurance Company the sum of \$100,000 of the money and funds of the state,

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to be transmitted by the said company to the city of New York, and there paid to the said commissioners in money, or in seven per centum stock of the state at par. And that the company, in consideration of the deposit, executed and delivered a certain writing obligatory, of which profert is made, and which is as follows:

"OFFICE OF THE COLUMBUS INSURANCE COMPANY, OHIO, }
December 31, 1849.

"\$100,000.

"The Columbus Insurance Company hereby promises, for value received, to pay to the Ohio canal fund commissioners one hundred thousand dollars, on the 28th day of December, 1851, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, or at such other place in the city of New York as said fund commissioners may direct, with interest thereon at the rate of seven per cent. per annum, payable semi-annually on the first days of July and January, at the office of said Life Insurance and Trust Company in New York, or at such other place in New York city as said commissioners may direct; said sum of one hundred thousand dollars being this day deposited with said Columbus Insurance Company, to be repaid as above. Provided, that said Columbus 312] Insurance Company shall have the privilege or right to *pay the whole or any part of said one hundred thousand dollars, at any time before or at the the said 28th day of December, 1851, in seven per cent. stock of the State of Ohio at par. And the said Columbus Insurance Company hereby authorize the attorney-general of the State of Ohio, or any attorney at law of said state, to appear in the court of common pleas, or any other court of record in the county of Franklin, Ohio, at any time after said sum of one hundred thousand dollars shall become due, and acknowledge service of process on the part of the said Columbus Insurance Company, and confess a judgment thereon against said Columbus Insurance Company, in favor of said canal fund commissioners, or in favor of the acting commissioner of the canal fund, for the amount due on said sum, with the interest thereon.

"In witness whereof, the president and secretary of said company have hereunto set their hands, and affixed the seal
[L. S.] of said company, the day and year above written.

(Signed,)

"E. F. DRAKE, *President*.

"Attest: D. ADAMS, JUN., *Secretary*."

The declaration then alleges that, in consideration of the premises, E. F. Drake, Demas Adams, Jun., Thomas Moodie, William Miner, Joseph Whitehill, Demas Adams, John Graham, and Joel Buttlers (since deceased), executed and delivered a certain other

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writing obligatory, of which profert is also made, and which is as follows :

"Whereas, the Ohio canal fund commissioners have this day deposited with the Columbus Insurance Company the sum of one hundred thousand dollars, payable on the 28th day of December, 1851, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, or at such other place in the city of New York as said fund commissioners may direct, with seven per cent. interest thereon, payable semi-annually on the first days of July and January, at said office of the Ohio Life Insurance and Trust Company, in the city of New York, or at such other place in the city of New York as said commissioners may direct; said Columbus Insurance Company having the right to pay said sum of one hundred thousand dollars, or any part thereof, at any time before or at said 28th day of December, 1851, in the seven per cent. stock of the State of Ohio at par.

"Now, for the purpose of securing to the said canal fund commissioners the payment of said sum of one hundred thousand dollars, with the interest thereon, as specified in the agreement of the Columbus Insurance Company, bearing even date herewith, as hereinbefore stated, in substance, and in consideration that the said fund commissioners have deposited said sum of one hundred thousand dollars with said Columbus Insurance Company, we whose names are hereunto subscribed, agree and bind ourselves, that said Columbus Insurance Company shall pay said sum of one hundred thousand dollars, with the interest thereon, as hereinbefore stated. And if said Columbus Insurance Company shall fail to pay said sum, or any part thereof, with the interest *thereon, as afore- [313 said, we bind ourselves to pay the same to said canal fund commissioners; and we hereby authorize the attorney-general of the State of Ohio, or any attorney at law of said state, to appear for us jointly and severally, and acknowledge service of process and confess a judgment in our names against us, at any time, and after said sum shall become due, in favor of said canal fund commissioners, or in favor of the acting commissioners of the canal fund, for the sum remaining due, with interest thereon, the said attorney to release all errors in said judgment to be confessed by him against us aforesaid.

"In witness whereof, we hereunto set our hands and seals, at Columbus, Ohio, the 31st day of December, 1849.

" WILLIAM MINER,	[L. S.]
" JOSEPH WHITEHILL,	[L. S.]
" DEMAS ADAMS,	[L. S.]
" JOHN GRAHAM,	[L. S.]
" E. F. DRAKE,	[L. S.]
" D. ADAMS, JR.,	[L. S.]
" JOEL BUTTLES,	[L. S.]
" THOMAS MOODIE,	[L. S.]"

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The declaration then avers a demand of, and a failure to pay both the principal and semi-annual interest, and notice of these facts to the defendant. It also negatives all the stipulations by way of proviso, exception, or condition precedent.

The court of common pleas sustained a general demurrer to this declaration. Judgment was thereupon given for the defendant, and the plaintiff appealed to the district court.

Ewing, Hunter & Pugh, for plaintiff.

Wilcox, and *Swan & Andrews*, for defendant.

RANNEY, J. The questions presented in this case arise upon a demurrer to the plaintiff's declaration. The importance of the case to the parties, the large amount involved, and the difficult application of the principles upon which its decision depends, fully justify the very elaborate examination given it by counsel.

On the 31st of December, A. D. 1849, the canal fund commissioner of the state drew from the treasury, of money belonging to the state, and applicable to the payment of its indebtedness becoming 314] due in the city of New York on the *first of January, 1852, and delivered to the Columbus Insurance Company, one hundred thousand dollars, taking from the insurance company a bond of that date, by which, after reciting that that sum had been deposited by the commissioners with that company, the company, for value received, promised to pay the amount, with seven per cent. interest thereon, on the 28th day of December, 1851, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, or at such other place in New York city as said commissioners might direct, with the privilege of paying the whole, or any part of the amount, in the seven per cent. stocks of the state at par. At the same time, and as a part of the same transaction, the defendant's testator, with others, executed and delivered to the commissioners a separate bond, binding themselves that the insurance company should pay the amount, with interest, at the time it fell due, or, in default, that they would pay it. The declaration avers that the sum was *deposited* with the company, "with a view to the redemption of a portion of the seven per cent. stock of the state of Ohio, and to the increase and advancement of the canal fund, at the instance and request of Joel Butties and others named," and "to be *transmitted* by said insurance company to the city of New

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York, and there to be paid to said fund commissioners, in money or in seven per cent. stock of the State of Ohio at par."

In support of the demurrer, it is claimed :

1. That the transaction was, in substance and legal effect, a *loan* of the public moneys, which the fund commissioners were not only not authorized by law to make, but were expressly prohibited from doing so, and made liable to indictment and punishment for doing it.

2. That this transaction being a *loan* of money not only not authorized, but expressly prohibited by statute, the instrument set out in the declaration, on grounds of public policy, is illegal and void ; and no action can be sustained on it in a court of justice.

*3. If it should not be held a loan, but a *deposit* (which it is [315 conceded the commissioners might lawfully make), it is still objected that the instrument is illegal and void, because the insurance company had no corporate power to receive money on deposit, or to engage in the business of exchange.

I. We can entertain no doubt that the money advanced to the insurance company was, in substance, and legal effect, a loan, which, upon its face, established the relation of lender and borrower between the state and the company. The instrument, it is true, recites that the sum has been *deposited* with the insurance company, and that it is to be repaid as specified in other parts of the bond. But the whole instrument, taken together, most clearly shows that it was to, and did, become the money of the company, and constitutes the "value received," for which the company undertook to pay the sum of one hundred thousand dollars two years thence, with interest.

The fund could not be withdrawn at the will of the state ; it was not placed with the company for safe keeping, or transmission ; but the clear and manifest object was to enable the company to obtain the use of the money for a long period of time, to be used, controlled, and treated as its own, and the state to derive a profit from its use.

The authorities are united in treating such a transaction as a loan upon interest: *Commercial Bank of Albany v. Hughes*, 17 Wend. 100; *Bank of Orleans v. Morrill*, 2 Hill, 295; *Leavitt v. Palmer*, 3 Conn. 35; *Southern Loan Company v. Morris*, 2 Barr, 175.

Had the commissioners power to make the loan? Upon this question a large number of statutes, extending from 1825 to 1846

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have been referred to, and commented upon at length by counsel. It is unnecessary for us to examine them in detail. We have carefully read them all, and are entirely satisfied that the policy of the state has always been, what we have no hesitation in saying it should have been, to prohibit its officers and agents from loaning **316]** or dealing in its *funds, either on public or private account. A few exceptions, when they have been authorized by special statutes to loan or otherwise improve particular funds, only make the general rule the more manifest. The act of 1825 (Chase Stat. 1472), while it gave to the commissioners the most ample power in relation to obtaining loans, paying interest, depositing and transferring funds, contains this significant provision: "They [the commissioners] shall recommend, from time to time, to the legislature, the adoption of such measures as they may think proper for the *improvement* of said fund." Nothing could show more clearly the fixed purpose of the general assembly to reserve to itself the exclusive power of determining whether any portion of the fund should be loaned or invested. The commissioners were only to recommend measures for legislative action; not to attempt to *improve* the fund, without express authority given by that body.

But it is quite immaterial what might have been the state of legislation prior to 1840. The act of March 23, of that year, "to regulate the receipts and disbursements of the canal fund," which repeals all prior laws inconsistent with its provisions, very carefully provides for paying into the state treasury, all moneys belonging to that fund as they are received, and, except the portion applicable to the sinking fund, expressly prohibits their being drawn from the treasury until they are needed to pay the liabilities of the state; while the 15th section of the act of March 10, 1843, to reorganize the board of canal fund commissioners, provides, that they shall act as commissioners of the sinking fund, "and shall, from time to time, apply all moneys accruing to the credit of said fund to the purchase of, or investment in, the public debt of this state, and to no other use or purpose whatever."

The act of March 2, 1846, "to prescribe the duties of the board of public works, canal fund commissioners, etc.," after requiring sundry duties to be performed by the auditor and treasurer of state, **317]** in the 6th section provides, that all *"revenues appropriated by law to the canal fund, or to the interest fund, shall be carried by the state auditor to the credit of the interest fund, and shall be

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paid by the state treasurer, on the warrant of the auditor, to the commissioners of the canal fund, and shall be, by said commissioners, applied to the payment of interest on the public debts of the state, *and for no other use or purpose.*"

On the same day was passed an act "to punish the embezzlement of public moneys, and for other purposes."

The first section subjects to the penalties prescribed by law for feloniously stealing property, any officer appointed or elected under the constitution or laws of the state, or any agent or servant of the state, who should convert to his own use, or use by way of investment in property or merchandise, or make way with or secrete, any money or valuable security received for safe keeping, disbursement, transfer, or other purpose, which might be in his possession, or over which he might have supervision, care, or control, by virtue of his office or agency.

The second section inflicts a fine of not less than \$50, or more than \$500, and a forfeiture of office, and incapacity to hold office for five years, upon any "such officer, agent, or servant," who should "loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care, or control, by virtue of his office, agency, or service."

The third section avoids every agreement made by any such officer, agent, or servant, by which he is to derive any advantage or benefit from deposits made by him, and provides that they shall inure to the benefit of the state; while the fourth section inflicts a penalty upon the officer or agent who shall make any such contract or agreement.

From this hasty and very imperfect sketch of the most material parts of the legislation brought to our notice, in force when this contract was made, we are of opinion that there was then no authority given to the fund commissioners *to loan any portion [318 of the public moneys placed under their control; but on the contrary, they were expressly prohibited from doing so; and for a violation of their duty in this particular were subjected to the penalties provided in the second section of the act of 1846.

We have attentively considered the argument advanced by the plaintiff's counsel, that this section was only intended to apply to cases in which the officer corruptly, and without any purpose to serve the interests of the public, loans the public moneys intrusted

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to his keeping, for his own benefit or advantage, or that of his friends; and not to loans made by an officer in good faith for the public benefit. But no such qualifications are found in the section; and to interpolate them would be, in our opinion, to subvert the very policy the general assembly was laboring to establish.

They had again and again provided that the public moneys should remain in the treasury until they were required to pay the public creditors; except such of them as belonged to the sinking fund; and *they* were only permitted to be drawn from there to be placed in the public stocks. The officer was invested with no discretion to determine that the public interests would be promoted by using them for purposes not provided by law. It was to keep them where they belonged that this additional safeguard was provided, and it needs but very little experience to discover its wisdom.

We quite agree that the first section only reaches a conversion to the private use of the officer, and for that subjects him to infamous punishment; while the third and fourth clearly imply the lawful right of the officer to deposit the public money when necessary in the discharge of his official duties, and only punish the abuse of the privilege when he endeavors to secure some benefit or advantage to himself. In our view the second section has its own distinct objects, ends, and aims; which are enforced, not by such infamous punishment as very properly attaches to a corrupt conversion of the funds to the private use of the officer, but such [319] *as appropriately follows official delinquency and breach of public trust in a way to endanger their safety. It seems to us that the language and purpose of the section are both disregarded when it is taken for anything less than an absolute prohibition to every officer, agent, or servant of the state, having public moneys in his hands, or under his control, to loan them out, either on private or public account without express authority of law.

II. It follows from these conclusions that the loan made in this case was wholly unauthorized, and that the state was not, at the time the contract was made, bound by it. Whether she could lawfully make herself a party to it and claim the benefit of its provisions, and whether she has actually done so, are entirely different questions.

We agree that she can only do so upon the same terms, and subject to the same restrictions as a private individual. When she appears as a suitor in her courts to enforce her rights of property,

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she comes shorn of her attributes of sovereignty, and as a body politic, capable of contracting, suing, and holding property; is subject to those rules of justice and right, which, in her sovereign character, she has prescribed for the government of her people.

If she makes herself a party to the contract of her unauthorized agent by ratifying his acts, she must take the contract as he has made it, and stand by all its provisions. If its inherent vices are such as to prevent its being enforced for an individual, it can not be enforced for her. Whether this contract is of that character, we now proceed to inquire, assuming for this purpose that it has been ratified by the state.

The assumption that it is, is founded upon a very ancient and very important maxim of the common law, *ex turpi causa, non oritur actio*. As illustrated in the multitude of cases collected with great industry by counsel, it denies the right to recover upon any contract of which the consideration or obligations to be performed are *contra bonos mores*, forbidden by positive law, or opposed to public policy. As *forcibly said by Chief Justice Wilmut, in [320] *Collins v. Blantern*, 2 Wils. 341: "You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice."

It would, indeed, be a gross absurdity that the government, through its courts, should aid in the subversion of its own policy; assault those principles of virtue and morality it is created to uphold; or itself overthrow the law which it compels others to observe, and which it was made to enforce.

In every executory contract two things are to be observed; the consideration paid or advanced, and the promise founded upon it. If any part of the consideration given is illegal or immoral, the whole contract is void, because the illegal, as well as the legal part of the consideration, has inseparably entered into and formed the inducement upon which all the undertakings of the other party are founded. If the consideration is legal, and a part only of what is agreed to be done is illegal, and that may be separated from the balance, the contract may have effect, and be enforced for everything but the illegal stipulations.

In this case the consideration of the contract was money, and the promise of the defendant's testator was to repay it with interest. It was lent and borrowed, so far as we know, to be applied to a lawful purpose. Aside from any statutory prohibition, it would not be

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thought either illegal or immoral for the state or an individual to lend money upon interest; nor would it be supposed a violation of either law or morals for the individual who borrowed it to pay it as he had agreed. The whole question, therefore, depends upon the construction to be put upon our statutes prohibiting the agents of the state from lending its money. There is nothing in any of them, we concede, to induce the belief that any relaxation from the full effect of this salutary maxim was intended. But the maxim itself has its limits; lying, too, so near the limits of other principles leading to different results, that like the blending of colors, it is often difficult to separate them; and in many cases quite impossible without *careful attention to the spirit and purpose with which it was established.

It certainly can not be applied to annul contracts made by an agent in the name of his principal, without authority or in direct disobedience to the orders of his principal; as that would overturn another principle equally ancient and well established, that the principal may subsequently ratify such unauthorized acts of his agent, and be entitled to all the benefits and incur all the obligations of the contract, "as fully to all intents and purposes as if he had originally given him direct authority in the premises, to the extent which such acts, doings, or omissions reach." *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* Story on Ag., sec. 239.

What object, then, was intended to be accomplished by these statutes, and particularly the 2d section of the act of 1846? To determine this, the whole statute must be considered, and the intention of the legislature discovered. In *Harris v. Runnels*, 12 How. 84, the court say: "We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and penalty, or a penalty only for doing a thing it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so." This was said in a case where both the maker and payee of the note in suit had incurred the penalty of a statute of the State of Mississippi, for selling and buying a slave brought into the state in violation of its provisions, and yet the obligation was enforced.

Applying the doctrine to these statutes, we have no difficulty in

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saying that their whole object, spirit, and design, is preserved when they are made operative between the state and its agents, in deterring the latter from the interdicted use of the public moneys ; and that upon no fair construction can they be held to operate upon the unauthorized contract *so as to prevent the state [322 from claiming the benefit of its provisions, should she deem that the most feasible mode of replenishing the public treasury. Unwilling to trust the agents of the state, the legislature has seen fit to deny *them* the power to loan the public funds, and, the better to secure obedience, has prescribed penalties for the transgression of its instructions. But the state, through its legislative department, is nowhere prohibited from doing it. The agent can not do it for the principal, but the principal can do it for itself and make a perfect lawful contract, neither prohibited by law nor immoral in its tendency or effects. Now, who are the parties to this contract? Plainly, the state on the one part, and the defendant and his associates on the other. They are all competent to contract, and have contracted upon a lawful subject-matter, neither injurious to the public morals nor prohibited by any law. The one has lent money, and the other has borrowed and agreed to repay it ; and this is the contract we are called upon to enforce, and these are the parties before us. We have no right to look beyond them ; their rights are alone involved in this controversy. When the agents of the state exceeded their authority, the state had its option to ratify their acts or repudiate the contract they had made in its name ; but when it elected to ratify, it assumed all the obligations of the contract from its reception, and was entitled to all its benefits. If the state could have lawfully made the contract at the time and under the circumstances it was made, it could lawfully adopt the one made in its name by those who assumed to act as its agents. If she could not lawfully have made it without the intervention of an agent, she could not lawfully adopt one made by an agent, either with or without authority. It was her interest in her own money that she designed to protect by the restrictions placed upon her agents, and not the public morals ; and she had a perfect right to waive the wrong committed upon herself, and adopt the contract made in her name, with all the rights that it conferred. If, when *adopted, the consideration upon which it was made, [323 or its performance by the other party, is found to be illegal or immoral, it will no sooner be enforced for her than for the most ob-

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scure citizen; but if it then stands without objection in both these particulars, it is no defense to say she was wronged by her agents, when they assumed, without authority, to act in her name. That is a matter between her and her agents; the option whether she will make herself a party to their acts, and be bound by the contract they have made, belongs to her, and not to those who have not and could not have been injured.

In short, any contract that an individual, or body corporate or politic, may lawfully make, they may lawfully ratify and adopt, when made in their name without authority; and when adopted, it has its effect from the time it was made, and the same effect as though no agent had intervened. The state could lawfully have loaned this money, and the defendant's testator could lawfully have bound himself to repay it. If the contract has been ratified and adopted by the state, in judgment of law the state did loan the money, and the defendant's testator did promise the state to repay it.

III. Has the state ratified the contract? Upon this demurrer we are bound to say that it has. The state is a party to the record, suing upon the contract, without any suggestion that the suit is prosecuted without authority. It has long been settled that this would be deemed sufficient evidence of ratification in the case of an individual; and we know of no reason why the state is not entitled to the benefit of the same presumption. Differences no doubt exist between the ratification of a contract by the state and an individual; but this is not one of them.

It is proper, however, we should say, that this contract could have been ratified only by the general assembly. That body alone had power to have made the loan, at the time it was made, and to have bound the state by the contract; and the ratification of a contract already made, requires no less power. No officer or agent could have done it, because no officer or agent could have made the contract. They were not only without authority, but expressly prohibited. Without the intervention of legislative discretion, it can not be told whether it was for the interest of the state to ratify it. The moment it was ratified, it is perfectly settled the state lost all remedy against its unfaithful agents. Story on Ag., sec. 243.

This remedy could not be released, or the benefits of the contract acquired, without the action, in some way, of that department of the government, having power under the constitution, to dispose

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of the property of the state. This was settled, upon much consideration, in the case of *The State of Illinois v. Delafield*, 2 Hill, 159.

If it could only be ratified by a public law, of which we could take judicial notice, we should now be bound to declare whether the contract had ever taken effect. But, without undertaking to determine what action of the legislative body might be sufficient for the purpose, we are of opinion that it might be ratified in other ways than by such law; the evidence of which may be contained in the journals of the two houses, of which, it is well settled, we can not take notice. 1 Greenl. Ev. 6.

On the whole case, therefore, we are of opinion that the transaction with the insurance company was a loan, within the meaning of the second section of the act of 1846, which the fund commissioners had no power whatever to make, and for which they became liable to the penalties therein prescribed. But the state, through its legislative department, had power to make such a contract; and just as ample power to ratify one already made without authority. On this demurrer we are bound to suppose it has ratified this contract; and if it has, the contract has taken effect between parties under no legal impediment to contract, upon a money consideration, and requires nothing to be done in its performance in violation of any law, or of public morals. It does not arise, therefore, *ex turpi causa*; but the whole case depends upon the law of agency, and the right of a principal *to ratify the unauthorized acts [325 of an agent. The statute spends its whole force back of the contract, and can not be held to affect it, without coming to the unwarrantable conclusion, that in addition to punishing the unfaithful agent for a wrong done to the state, the legislature intended to do what they could to prevent the state from obtaining redress from those who had combined with its agent and enjoyed the fruits of his unlawful conduct.

As this was a loan, it is unnecessary to refer to the powers of the corporation to receive deposits, since it is not doubted it had full power to borrow money.

The demurrer must be overruled, and the cause remanded to the district court for further proceedings.

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DEWITT v. THE SCHOONER ST. LAWRENCE.

An action does not lie, under the water-craft law, against a vessel, to recover money loaned.

Nor for a breach of an executory contract for the transportation of goods, where the goods are not delivered to the vessel, and where, therefore, the obligation of a common carrier never arose.

ASSUMPSIT. Reserved in the district court of Cuyahoga county.

The cause was submitted to the district court without the intervention of a jury, the entire evidence being in deposition; but the judges being equally divided in opinion, the case was reserved on the defendant's motion. The deposition was that of D. Spooner, captain of the schooner St. Lawrence, and was in substance as follows: Deponent sailed the schooner St. Lawrence upon Lake Erie during the season of 1851. On the 5th day of September, 1851, the schooner had a cargo of staves and lumber on board, belonging to Mr. Wm. H. Dewitt, of Cleveland; was at that time engaged in 326] transporting such freight for Dewitt from *different ports on Lake Erie, in Ohio, to Tonawanda and Buffalo, N. Y. At the time deponent had the cargo above mentioned, on board at Cleveland, he wanted \$500 in order to pay the liabilities of the schooner, and applied to Freeman Butts, the agent of Dewitt, to advance, as such agent, that sum on freights to be earned by the vessel. Deponent agreed with Butts, that if he would advance said sum, he would pay \$200 out of the freight of the cargo then on board, on the arrival of the vessel at Tonawanda, and at least \$100 on the freight of each cargo after that date, until the \$500 was paid, with interest. Deponent agreed to continue transporting lumber and staves for Dewitt, until the \$500 was fully paid, with interest. Freeman Butts, as agent of said Dewitt, thereupon advanced the \$500 on the terms above specified. On the 11th September, 1851, the schooner arrived in Tonawanda with the cargo of staves and lumber first mentioned; and out of the freight, which amounted to \$214.14, deponent applied \$107.14 toward the payment of said \$500, and with the balance paid the running expenses of the vessel.

The next cargo of staves and lumber was received at Black River and delivered at Buffalo, 24th September, 1851. The freight amounted to \$142.05, of which amount \$2.67 were applied in pay-

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ment of the \$500; the balance was retained by deponent to refit the vessel, she having been dismantled on that trip.

October 18, 1851, the schooner arrived at Tonawanda with another cargo of staves for Dewitt, from Sandusky. The freight amounted to \$213.07, of which amount \$132.90 were applied toward the payment of the \$500, and the balance retained for the running expenses of the vessel.

November 14, 1851, the schooner arrived at Tonawanda from Vermillion, Ohio, with another cargo of staves for Dewitt; the freight amounted to \$217.34, of which amount \$117.34 was applied on the \$500, and the balance retained to defray the running expenses of the vessel.

Dewitt had other lumber which he wished deponent to transport from ports in Ohio to Tonawanda or Buffalo, in fulfillment [327 of the contract, but deponent did not take any further freight for said Dewitt. The unpaid balance of the \$500 advanced by the agent of Dewitt, amounted to \$141.75, which deponent supposes is still unpaid. Of the \$500 advanced by Dewitt's agent, deponent paid \$100 to Robert Caulkins on the purchase money due him for said schooner; and the balance of \$400 was expended in discharge of debts previously contracted for repairs and running expenses, for which the vessel was liable.

Deponent was the owner of the schooner, by virtue of a contract of sale to him by Robert Caulkins. Deponent did not comply with the terms of the contract, and the vessel went back into the hands of Caulkins, because of the non-fulfillment of the contract for the payment of the purchase money in full.

Charles L. Fish, and J. B. & F. J. Prentiss, for plaintiff.

Lynde & Castle, for defendant.

THURMAN, C. J. The plaintiff claims a right to maintain this in virtue of the first section of the water-craft law. The section is as follows:

"That steamboats and other water-crafts navigating the waters within or bordering upon this state, shall be liable for debts contracted on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies, or labor, in the building, repairing, furnishing, or equipping the same, or due for wharfage; and also for damages, arising out of any contract for the

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transportation of goods or persons, or for injuries done to persons or property by such craft; or for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or sanction of either of them, to any person who may be a passenger or hand on such steamboat, or other water-craft, at the time of the infliction of such damage or injury."

The clause of the section that is relied on, is that making the vessel liable "for damages arising out of any contract for the transportation of goods."

328] *It is not easy to discover the nature of the transaction in which this controversy originated. The testimony leaves it doubtful whether it was a mere loan to be repaid in money out of freights to be earned by the vessel, or an advance of freights, for which the plaintiff, and not his consignees, would be liable upon the transportation of his goods; or, an advance of freights, which such consignees, and not the plaintiff, were the proper persons to pay.

If it was a mere loan, *McGuire's Adm'rs v. The Canal-boat Kentucky*, 20 Ohio, 62, is a direct authority for saying this action can not be maintained.

If it was an advance of money upon an executory contract for the transportation of the plaintiff's goods, a mere payment, in advance, of freights which he was the proper person to pay, the case is not essentially different from that of the *Canal-boat Montgomery v. Kent*, 20 Ohio, 54, and the action must fail.

It is not, however, upon either of these grounds that the plaintiff relies. His counsel assume that the consignees were the persons to pay the freights, that the plaintiff had a right to require them to do so, or at least that they were not entitled to the goods without such payment, and finally, that they did, in fact, pay them; and, upon these premises, it is argued, with much ingenuity, that the case of the *Argyle*, 17 Ohio, 460, fully supports this action.

But we are not satisfied that the proofs make the case here assumed. If we look at the written contract alone, perhaps the proper construction to give it would be that it is evidence of a loan upon the security of freights to be earned by the vessel. If we take into consideration the surrounding circumstances, we find that the goods, by whose transportation the freights were to be earned, were the plaintiff's goods, and there is no testimony showing that any other person ought have paid the freights. For aught that appears, he may, himself, have been the consignee. If it be

said that this can not be, because the freights were paid by the consignee, *it may be replied that it does not clearly appear how [329 they were paid; whether altogether in money, or partly in money and partly by a credit on the contract with the plaintiff. If the latter was the fact, it may well be that the plaintiff was the consignee, and that he saw fit to indulge the owner of the vessel by paying him in money more than he was entitled to; or, in other words, by not requiring as large an application of the freights earned, to the discharge of the contract, as might have been insisted upon.

But whether the plaintiff was the consignee or not, it distinctly appears that the goods were his goods, and were transported for him, and if the money advanced was not a mere loan, it was an advance of freights, to pay which no one but he is shown to have been liable.

Upon the whole case, then, we incline to think that the transaction was a mere loan upon the security of, or to be repaid from freights to be earned by the vessel, or which is, perhaps, more probable, that it was simply a payment in advance upon an executory contract for the transportation of the plaintiff's goods.

If it was either, this action can not, as I have before said, be maintained.

This conclusion renders it unnecessary to decide whether, if the facts were as assumed by the plaintiff's counsel, the action would lie.

As the only testimony in the case was that offered by the plaintiff, we are at liberty to give a judgment in bar, or to order a nonsuit. We think it proper to do the latter.

Judgment of nonsuit.

WARDEN, J. The proposition contained in the second division of the *syllabus*, is one to which I can not subscribe. A contract for the transportation of goods is often made at the solicitation of the master or other officer of the boat, seeking to secure a "good trip," for the next venture of the vessel. Merchants hold the freight for the particular boat, under the pressure of such solicitations, and on promises that *the transportation shall be [330 promptly made. One of the mischiefs to be remedied by the so-called steamboat law, was the violation of just such contracts. I think, rightly construed, the statute has supplied the remedy.

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THOMAS PARROT v. THE CINCINNATI, HAMILTON AND DAYTON
RAILROAD COMPANY.

When a declaration charges a railroad company with obstructing a public street adjoining the residence of plaintiff, and thereby preventing a free passage to and from his dwelling-house; that the company kept up dangerous fires, generated and deposited about his premises noxious vapors and smoke, jarred and disjointed his house, made his residence unwholesome and uncomfortable; and that the railroad company did these things *unlawfully* and with intent to injure the plaintiff, a good cause of action is shown.

That a demurrer to such a declaration is not well taken.

That the court, on such demurrer, can not determine whether the company had power to do such things or not, at that particular place.

That, if the acts of the company were lawful, the company must show that fact by plea, or in some other way, on the trial of the cause.

RESERVED in the district court of Montgomery county.

The facts and questions involved are fully set forth in the opinion of the court.

Parrot & Baggot, and Odlin & Lowe, for plaintiff.

Davies & Crane, and Haynes & Howard, for defendant.

KENNON, J. This is an action on the case brought by the plaintiff against the defendant to recover damages for an injury claimed to be sustained by the plaintiff from the act of the defendant in constructing a railroad on a street in the city of Dayton, and running its cars thereon. To the second count of the plaintiff's declaration the defendant demurred, and the question is: Does that count show any cause of action in the plaintiff?

The count avers that the plaintiff at and before the time of committing the grievances therein mentioned, was, and *still is, possessed of a dwelling-house and premises on a lot in the town of Dayton, that the lot adjoins, on one side, Jefferson, and on the other, Sixth street, which are common and public highways, dedicated to a free and common use as public streets; that plaintiff and family reside in said house; that he ought to have and enjoy the benefit of the free, safe, and unobstructed use of said streets, to go to and from his house on foot, and with horses, wagons, and carriages; that he ought to be permitted to enjoy peaceably and

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quietly said house and premises. But that the defendant, *wrongfully intending* to injure the plaintiff, and deprive him of the free, safe, and unobstructed use of said streets, and the quiet occupancy of his house and premises, *wrongfully* and *unlawfully* constructed a railroad along said Sixth street, and upon and across Jefferson street, within twenty feet of the plaintiff's premises, and placed and erected divers large quantities of gravel, earth, timber, and iron thereon, and unlawfully and injuriously continued the same. That upon said road the defendant placed and run engines, cars, and locomotives, making horrible sounds, greatly shook and jarred his dwelling-house; that the defendant kept up, for the purpose of running said machine, dangerous fires, and thereby, near the house of the plaintiff, generated noxious vapor and smoke, and diffused the same in and about his premises. By means of which grievances the public streets at said places were *filled up* and *obstructed*, and the plaintiff prevented from having a free, safe, and unobstructed use of the same, as he ought to have had, and otherwise would have had; that his house was shaken and disjointed; that the air, by reason of the vapor and smoke, was rendered unwholesome, and he greatly annoyed in his possession.

The defendant, by the demurrer, admits all these facts to be true, but claims that if true, the plaintiff had no cause of action.

We are asked to look into the charter of the company, and from that charter to determine several important questions, among which are the following: Does the charter authorize **the company* [332 to make a railroad *into* or *through* the city of *Dayton*, the language being *from Cincinnati to Dayton*? If the company have the authority to make the road *into*, or *through* the city of *Dayton*, can the State of Ohio, or the municipal corporation of *Dayton*, or both, authorize the company to occupy the streets with their railroad, especially without compensation to the property holders in the city? We think these, and several other questions made in the argument of counsel, do not arise on this demurrer. We do not know from this count in the declaration, that the railroad mentioned is a *part* of the Cincinnati and Dayton railroad, or that it is anything more than a railroad from one part of the town to another. All we do know is that the plaintiff says the defendant *unlawfully* and intentionally committed the grievances mentioned in the second count, and the defendant admits the truth of the charge as stated. Now, although we do take notice of the charter as a public law, still we

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can not say that the *piece* of railroad in a street was made under, or in pursuance of that charter, or that it is any part of the Cincinnati, Hamilton and Dayton Railroad. It may not be, and the question a whether it is or not can not be raised by demurrer. We do not perceive what obligation was on the plaintiff to show that it was not a part of that road, or that it was improperly constructed or used, otherwise than he has alluded in his declaration. If it be a part of the Cincinnati, Hamilton and Dayton Railroad, made in pursuance of its charter, that fact must be shown by the defendant by plea, or in some other way, on the trial, and the questions intended to be raised, properly made. As the case now stands, we think the plaintiff has made a case for recovery.

We intentionally avoid expressing any opinion upon any question not before us upon the record.

It is claimed that there is duplicity in this second count, but this is not urged in the argument, and if it was, we think that objection could not be sustained.

The demurrer is overruled

333] *STEAMBOAT WELLSVILLE v. PHILIP F. GEISSE

Where the apparent intention of the parties to a contract is to have new machinery made, and old machinery repaired, and put into running order, for a single purpose, of which work a part is not to be done without the whole, and all the parts bear a necessary relation to each other, and where the provision for payment indicates that the parties themselves regard the agreement as an entirety, their intention prevails over any technical rules of construction, and the contract is to be taken as an entirety.

In such a case, the mechanic can not, by suing on part of the contract which he claims to have fully performed, and declaring under the *quantum meruit*, as to the work not paid for, cut off the defendant's right to *recoupe* the damages on the whole.

Unsettled as were for a long time the limits within which it could be made available, as well as the condition of its exercise, the right of recoupment has at length become fixed and certain in England, as well as in most of our sister states, and it must now be recognized as a part of the law of Ohio.

Recoupment, however, even as enlarged in its meaning by modern usage, signifying nothing more than a reduction of damages, the right can not be exercised under a plea, the office of which is to set up a complete bar. Notice of the intention to *recoupe* must be given specially.

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ERROR to the district court of Columbiana county.

The defendant in error brought his action against the plaintiff in error under the act relating to water-crafts, and declared in *assumpsit*, on the common counts. The plea was *non-assumpsit*, and with it were filed the common notice of set-off, and a special notice as follows:

"The plaintiff is also notified, that on the trial of the case the defendant will give in evidence a certain contract under seal, signed by the plaintiff and one A. G. Catlett, dated November 17, 1846, for the doing of the very same work, and furnishing the very same materials, as are set out in plaintiff's declaration, and also a certain other written proposition, signed by plaintiff, without date, and made and delivered to said A. G. Catlett, with the indorsement thereon, for the doing and performing the very same work, and furnishing the very same materials, as are set out and claimed in plaintiff's said declaration; and will also then *and there [334 prove that all the work done on said steamboat Wellsville, and all the materials therefor furnished, were done and furnished under a special agreement with A. G. Catlett, whereby he bound himself personally to pay plaintiff for same; and plaintiff then accepted him, Catlett, as paymaster for all work done and materials furnished in building and repairing the said steamboat Wellsville."

After a trial in the court of common pleas, and a reversal of the judgment in which it resulted, there were a second verdict and judgment in the common pleas; and the cause was appealed to the district court, where it was tried by jury, and a verdict given for plaintiff, who had judgment, a motion for new trial being overruled.

The petition in error is here filed to reverse the judgment of the district court.

It appears from the bill of exceptions allowed in the district court, that the plaintiff having given evidence of certain work and materials done and furnished by him, being the items set forth in his bill of particulars, and of their value, rested his case.

The defendant, to sustain the issue on her part, gave in evidence the contract and proposition referred to in the special notice to the plaintiff. It was admitted that the work sued for was done under this contract. The defendant further gave evidence tending to show that when the work was done, A. G. Catlett was the sole owner of the boat, and further offered to prove, that the portion of the work embraced in the first part of the contract, for which the con-

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tract provided that \$1,550 should be paid, as well as the part of the work embraced in the other part of the contract, and not included in this part of the work to be done for the \$1,550, was defective, and not of the quality required by the contract. To the evidence offered to prove that the work to be done for the \$1,550 was defective, the plaintiff objected, and the court sustained the objection, but permitted the defendant to prove any defects in that part of the work for which this suit was brought; also, to prove any defect in 335] the *application of said work embraced in the plaintiff's bill of particulars to the other work done. The defendant was also allowed to show any defects in the operation of any of the work done and finished by plaintiff, in consequence of, or caused by, any defects in said work embraced in said bill of particulars.

Defendant also offered evidence tending to prove, that all the work done by Geisse was not worth more than the sum which had been paid for said work, done at the price of \$1,550. The plaintiff objected to this evidence, which objection the court sustained.

Evidence was given by the plaintiff, tending to prove that A. G. Catlett was not the sole owner at the time said work was done, and when the contract with him was made; and also, to prove the sufficiency and good quality of the work for which this suit was instituted.

By this contract, "Geisse, on his part, agrees and binds himself to remove the engines from the steamboat North Queen to a new hull, and put them up in good running order, and to furnish the following amount of new work, to wit: new chimneys, breeches, and as much new fire-bed as may be necessary to make a good job; also, new fire-fronts, stands, and pipes about the boilers; also, to furnish new copper steam-pipe, in place of the iron; also, new supply-pipe; new brasses in all the bearings that are necessary; to place the force-pump forward of the cylinder timbers; and to do any minor repairs that may be necessary on the engines."

Catlett, on his part, agrees to pay Geisse, "for the above amount of work, fifteen hundred and fifty dollars, in payments hereafter named; to furnish to Geisse two boilers, 40-inch diameter, and length to suit himself; to furnish a new wrought-iron shaft, bosses and cranks; and to pay Geisse for fitting up and turning the shaft; and further, to pay Geisse 3½ cents per pound for any castings not herein named, such as flanges, pillar-blocks, etc., connected to the shaft; to pay Geisse for putting fosset cut-off on the engines, the

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charges *for the cut-off and fitting up of shaft as low in price [336 as any good shop in Pittsburg would charge. It is the understanding that Geisse gets all the old work that he replaces with new free of charge, except the shaft and boilers which Catlett furnishes, and that the work is to be done without any unnecessary delay, so as not to detain the hull longer than five weeks after it is ready to run the engines; payments to be made to Geisse as follows: one-fourth during the progress of the work, one-fourth at the time the engines are started in operation, and the balance in negotiable notes, payable in some of the banks, drawn by A. G. Catlett, and indorsed by the balance of the owners, and to be made payable in three and six months from the time of starting the engines, in equal amounts."

The written proposition referred to in the special plea is addressed to Catlett by Geisse, by which the latter offers to "repair the engines and put them in good running order, to set them upon a new boat, and make the following *new work*: new fire-front, new cross-pipes, and new stands, if necessary; new chimneys and breeches, new fire-bed sides, with part new bottom for fire-bed, using only as much of the old as will be good; also, new main steam-pipe, new fire-fronts, pipe for force-pump to boilers, and any other small pipes that may be necessary to make new, together with new brasses for all the bearings, and all the bolts about the engines and wheel necessary to be made new. I will be entitled to all the old work that is thrown off that I replace with new, for the sum of \$1,550." (Signed, "P. F. Geisse.")

Indorsed on this is the following: "In addition to the within agreement, I engage to make all additional castings required at 3½ cents per pound, and charge nothing for fitting them up; also, to make new side-valves, and bush the piston, the piston-rod stuffing box. Payments, \$300 within 30 days, \$475 between that time and completion of job, and the balance in three and six months after completion, secured *by good indorsed notes." (Signed, "P. [337 F. Geisse, A. G. Catlett.")

Lee & Gilman, for plaintiff in error.

Mason & Potter, for defendant.

WARDEN, J. It is urged in behalf of the defendant below (here plaintiff) that Geisse having fixed the prices of his work by his contract with Catlett, could recover only in accordance with its

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terms, and that in the absence of proof of the Pittsburg prices he was not entitled to recover at all; "and a verdict should, under the charge of the court, have been rendered for the boat." On the other hand, it is insisted that such proof was offered and read to the jury, and the depositions of two witnesses are referred to as exclusively confined to this proof. The record does not profess to state the testimony, and it is silent on this particular subject. No exception relating to it was taken, and we can not assume, from the mere bill of exceptions, that proof was not made of the Pittsburg prices. The presumption is the other way, and, according to Geisse's counsel, the fact is with the presumption.

The next matter of exception we propose to examine arises upon the rejection of certain evidence.

Geisse sued on the common counts, claiming under the *quantum meruit*. He must, therefore, have come prepared to prove what his work was worth, and to meet evidence showing it to be defective. But he did not sue on the whole contract; part having been fully performed, and the work so far paid for. It was in the power of the then defendant to convert his action into one upon the entire contract, and to hold Geisse to proof of its entire performance. That the instrument evidenced a single contract we have no doubt. Modern English cases, and the leading American decisions, have taken from the rules once applied to the construction of contracts, as to their entirety or divisibility, and the dependence or independence of their covenants, much of their ancient strictness and un-
[336] reasonable refinements, not *to say their absurd and oppressive character. In the language of Parker, J., in *Johnson v. Read*, 9 Mass. 83, they "show a disposition on the part of the judges to break through the bonds which some old cases had imposed upon them, and to adopt what Lord Kenyon, in one of the cases, calls the common-sense doctrine—that the true intent of the parties, as apparent in the instrument, should determine whether covenants are independent or conditional, instead of any technical rules of which the parties were totally ignorant, and the application of which would, in most cases, utterly defeat their intention." This is, in our judgment, the proper rule of construction. For illustration: Where the apparent intention of the parties to a contract is to have new machinery made and old machinery repaired and put into running order, for a single purpose, of which work a part is not to be done without the whole, and all the parts bear a neces-

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sary relation to each other, and where the provision for payments indicates that the parties themselves regard the agreement as an entirety, their intention prevails over any technical rules of construction, and the contract is to be taken as an entirety. Now this is the very case before us. We must, on the face of this contract, plainly perceive that the intention of Geisse and Catlett was to have new machinery made, and old machinery repaired and put into order, for the purpose of running a steamboat. Part of the work was not to be done without the whole, and all the parts bore the same relation to each other as the parts of a watch to the whole; and the provision for payments in the contract finally made, equally indicates that the agreement was an entirety. If it be allowable in such a case to consult the proposition on which this contract was founded, this opinion will not lose strength. The proposition, like the contract, had parts, but, as entertained by Catlett, these were dependent parts, and his signature was actually affixed to the proposition as a whole, so as to show this intimate relation of its parts, and, for that matter, even so as to constitute the paper a contract rather than a proposition. We say, then, the con- [339 tract was an entirety, and the defendant below might have availed himself, under proper pleadings and notice, or whatever defenses would have been proper had Geisse sued on the contract itself.

We can not entertain the argument of counsel for defendant in error, that because the boat could have had no cross-action against Geisse, there could be any distinction between what would have been a proper reduction of damages had Geisse sued Catlett instead of the boat, and what would be proper in Geisse's action against the boat. To allow a seizure of the boat under a claim resting on a written contract with the owner, and an entire disregard of that contract in such a proceeding, would be to convert the statute into a warrant of fraud and oppression; and to recognize Geisse's claims without holding him to his answering obligations, would be a mockery of justice.

Treating the case, then, in all respects as though Catlett had been defendant instead of the boat, and assuming, for the present, that the pleadings and notice were sufficient, what was the effect of introducing the contract, so far as the right to show defects in the work is concerned? It was, in effect, to convert the action from one on the common counts to one on a special count, framed on the contract itself.

Now, in the case assumed, defects in any part of the work might have been shown. But it would have been, not a bar, but a reduction of damages, or *recoupment*, which would have thus been accomplished. Whatever diversity of opinion and decision may have existed in Ohio, or may continue to exist, there are parts of the state in which the doctrine of recoupment has often been applied to cases like that supposed. No reported case of authority is against the doctrine. I am persuaded that in far the greater number of our judicial divisions, the right of *recoupment* is constantly recognized. As for its claims to be considered a part of the common law, it is sufficient to say, that though long disused, and sometimes denied, it is an ancient familiar in the English courts, 340] *well known to Coke himself. It was not, indeed, a term of so extensive signification as it seems to be now. The right it represents at this day was probably introduced to mitigate the severity of the statute of set-off, itself a graft from equity on the law. Unsettled as were for a long time the limits within which it could be made available, as well as the conditions of its exercise, it has at length become fixed and certain in England as well as in most of our sister states, and in declaring it a part of our own system of jurisprudence, we are not without such examples of its application as will enable us to adopt a safe rule for its extent, as well as the terms on which it ought to be allowed. That it is a part of Ohio law, we feel bound to declare. It is a right so reasonable in itself, so necessary to the simple and economical administration of justice, and so entirely congenial to our system of jurisprudence, that, however doubted or denied, in some parts of the state, it has in general commended itself to our courts, and become well established.

But we are aware that even where it has been most fully recognized, the manner in which a defendant may entitle himself to its benefit, is very variously regarded. It is sometimes said, that where the plaintiff claims under a *quantum meruit*, recoupment, may be had under the general issue. In strictness, however, recoupment is not at all applicable to such a claim. The whole question there is, how much ought the plaintiff to have; and proof of defects in his work is a direct answer to the question. Nor can it be surprising that there has been a difference of opinion on this subject. The fullest notice of the right itself is taken by Mr. Sedgwick, in his work on the Measure of Damages, and he treats the

subject with great ability. Yet his summary of the rulings on the subject of entitling the defendant to *recoupe* does not seem to answer the question whether notice is necessary, so as to put the rule in a very clear light. He says: "As to the way in which the defense of recoupment is to be set up, it is now settled, that evidence to support it, if total, and going to the whole action, will be received under the general issue, *but that where it is partial, [341 it can not be pleaded, and notice must be given with the plea." Sedgw. Dam. 444. It is not easy to reconcile this with the decision in several New York cases, that recoupment can not be made a complete bar even by an allegation that the damages which the defendant claims by way of recoupment exceed those claimed by the plaintiff. McCullough v. Cox, 6 Barb. 391; 2 Comst. 282. And when it is considered that recoupment, even as enlarged in its meaning by modern usage, signifies nothing more than a reduction of damages, it would seem plain that it can not be had under a plea, the office of which is to set up a complete bar. It has sometimes been supposed, however, that when *skill* is involved in the contract, proof that skill was wanting, is an answer to the allegation of the plaintiff that he has performed his contract. But the same notion is equally applicable to the action of a vendor for the price of goods sold with warranty—and, indeed, to every case in which assumpsit was brought to recover a stipulated price for work or goods, or the like. Yet, in all these cases, the unskillfulness of the performance, the defective quality of the goods, or like failure of the plaintiff to fill all the conditions of his contract, has been held to entitle the defendant, not to a bar of the claim, but a cross-action, or a recoupment in the action already brought. A noticeable case illustrating the necessity of notice is one reported in 11 Johns. 547. The action was for an attorney's bill, the defense negligence. The court say: "The defendant neither pleaded nor gave notice of this defense, and it must have been a complete surprise on the plaintiff, as he can not be presumed to have come prepared to meet it on the trial." Though since the decision of this case, it has been repeatedly held that *recoupment* is not the subject of plea at all, but must be had under notice, the case is one which shows clearly that the general issue would not let in the recoupment.

The etymology of the word fully justifies the notion that it is not proper to *recoupe* under a plea in bar. It is from *the [342

Law French *recouper*, to cut again, or to cut out and keep back. And so the courts now all understand it.

In New York, the court hold "notice to be an essential part of the rule." Sedg. Dam. 444. And since the adoption of the code, it is there understood that recoupment is to be had as a counter-claim, and can not be had under the denial allowed in a mere answer. Vansantvoord's Plead. 303, 304. As our own code is precisely similar to that of New York in this particular, it will be seen that the question of notice does not lose its importance when we come to the new practice. We have therefore felt it necessary to examine it fully. Our conclusion is, that the general issue did not entitle a defendant to offer evidence in recoupment of damages.

In the case before us, no sufficient notice was filed with the plea. The contract was, as we learn from the motion for new trial and the bill of exceptions, used in evidence in order to reduce the amount of plaintiff's recovery; but no intention to make such use of it is disclosed by the notice itself. On the contrary, the object of putting the contract in evidence would, from the notice itself, appear to be the entire defeat of the plaintiff by showing that he never had a claim on the boat, but relied on the personal responsibility of Catlett. And it is not a little singular that this closely litigated case would present a new and not inconsiderable difficulty had this been the real object of the defendant's counsel, and had they persisted in it. But, though the absence of notice would appear from the arguments to have been insisted on by the plaintiff below as one reason for opposing the introduction of the evidence offered, no leave to amend the notice or give a new one was asked. Why, we can only imagine when we look at this record, and find how long these parties have been litigating. From the record itself, no ruling on the subject of *recoupment* appears; and the whole case would seem to have turned on the question of notice. But it otherwise appears that the right of recoupment, as such, was wholly 343] denied. At first we felt disinclined *to rest our decision of this cause on the fact, that no notice was given of the intention to recoup damages, fearing that such a decision would be a surprise to one of the parties; but, on looking into the arguments, we find that the want of notice was insisted on below as one of the then plaintiff's objections to the evidence rejected. The adverse ruling of the court on the subject of *recoupment* left it within the power of the plaintiff in error to prepare his cause for a favorable decision

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here by asking leave to amend his notice. Whether that leave had been given or refused, the case would probably have been with the plaintiff in error, as we understand the law. But we are confident it would have been given. But be that as it may, the notice was not such as to entitle the plaintiff in error to recoupment of damages, and it was not amended.

The evidence which the court was willing to receive would have been proper in every view. Geisse had no right to notice so far; for he had sued under the *quantum meruit*, and must have come prepared to show the character of the work embraced in his bill of particulars. But no question of recoupment applies to this part of the case. The effect of the notice given was not to prepare the defendant in error for the question whether he had performed his entire contract; it was only to prepare him for proof that Catlett was the owner of the boat, accepted by Geisse as his paymaster. No question of performance, perfect or imperfect, whole or partial, is made by the notice; and it is not intimated that any other work or materials than those sued for will be subjected to question. So far as the notice went, its effect was to govern the action by the contract; but it did not go far enough to convert the proceeding into one upon the whole contract. If it had, however, notice of the intention to recoup would still have been necessary.

The judgment must be affirmed.

***CORNELIUS COAKLEY AND HARRIET COAKLEY v. OLIVER [344
H. PERRY AND HENRY B. PAYNE.**

The rule of estoppel applies in cases only where the grantee receives and holds possession, by virtue of the conveyance from the grantor, and relies upon it as the source of his title; it does not apply where the grantee already held under a prior and independent conveyance.

In case of a petition for dower, the grantee of a deceased husband, and those holding under him, are not estopped to deny that their grantor had title.

A person in possession of real estate under a *bona fide* claim of title, has the right to buy in any title, real or pretended, with a view to quiet the enjoyment of his possession; and the purchase of the adversary title, if it does not strengthen, can not impair his title.

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PETITION for dower; reserved in the district court of Cuyahoga county.

This is a petition for the assignment of dower to the petitioner, Harriet Coakley, in the undivided fourth part of the original two-acre lot, number one hundred and seventy-four, in the city of Cleveland. It appears that petitioner, Harriet, was formerly the wife of Job Doan, since deceased, who, according to the allegations of the petition, was, during his marriage with the said Harriet, seized in fee simple of the real estate above mentioned, which, in December, 1825, he conveyed by deed duly executed, but in which said Harriet did not join, to Nathan Perry, who subsequently conveyed the same to the defendants. And the claim to the assignment of dower is predicated on the fact of the conveyance by Job Doan in his lifetime, with covenant of warranty to Nathan Perry, under which it is alleged that the defendants derived title and occupy the premises. It is claimed that Job Doan acquired his title by inheritance from his father, Nathaniel Doan, deceased, who was said to have held the premises in his lifetime, by deed from Eben Hosmer, as collector of taxes, dated December 31, 1814.

It further appears in the case, that Nathan Perry purchased the premises in controversy, together with two other lots, from the executors and heirs of Gideon Granger, deceased, and took a conveyance therefor, in March, 1824, *under which he immediately took possession, and occupied until his sale and conveyance to the defendants, who have ever since occupied the premises. That Gideon Granger in his lifetime, and his legal representatives after his decease, were in possession of the lots, and the reputed owners thereof; and that neither Job Doan, nor his ancestor, Nathaniel Doan, were ever in possession of the premises. And Nathan Perry testifies, that some time after he had taken possession of the property, "Job Doan came into his store, and said that his father had a tax title for the lots which he had purchased from Granger's heirs; that he did not consider the tax title of any value, but he had had some trouble with the matter, and that he would sell it for ten dollars, which he thought was no more than equitable for the trouble which he had been to, and the money he had expended. That witness asked him about the other heirs of his father, to which Doan replied, they had had no trouble, and did not claim anything. And that witness paid him the ten dollars, and took the deed of December, 1825, above mentioned. And further, that neither Nathaniel

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Doan nor Job Doan, ever had, or claimed any right to possession under this tax title; and that he, Perry, gave the ten dollars as a gratuity, and it was so regarded by Job Doan himself.

Horace Foote, for the petitioner.

Wilson & Wade, and *S. J. Andrews*, for defendants.

BARTLEY, J. The claim to dower in this case, is founded solely on the assumption that the grantee of the husband, and those holding under him, are estopped to deny that their grantor had title. The petitioners have not sought to fortify their claim, by any proof tending to show the validity of the tax title out of which it originated; and if the doctrine of estoppel fails them, their claim is without any legal foundation to rest upon.

It was formerly held in New York, and, perhaps, in several other states, that in an action for dower, brought by a widow against the grantee of her husband, or those holding under him, such [346 grantee, and those deriving title from him, were estopped from denying the seizin of the husband. But this doctrine, after a very full examination, was overruled by the court of appeals in New York, in the case of *Sparrow v. Kingman*, 1 Comst. 242. And this adjudication has been repeatedly affirmed and recognized in subsequent reported decisions in that state. The same subject came under review, in the Supreme Court of the United States, in the case of *Blight's Lessee v. Rochester*, 12 Wheat. 535, in which it was held that the doctrine of estoppel, which forbids a party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, and, especially, where the latter has not received possession from the former. In this case, Chief Justice Marshall traces the origin of the doctrine on this subject, back to the feudal tenures, "when the connection between landlord and tenant, was much more intimate than it is at present, when the latter was bound to the former by ties not much less strict, nor much less sacred, than those of allegiance itself."

"The propriety," says Chief Justice Marshall, "of applying the doctrines between lessor and lessee, to a vendor and vendee, may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title,

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unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other, which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or the spirit of the contract violated by it."

It was held in the case of *Watkins v. Holman*, 16 Peters, 54, that the relation of landlord and tenant, in no sense, existed between 347] vendor and vendee. And Mr. *Justice Story is reported to have said, in the case of *The Society, etc. v. The Town of Pawlet, etc.*, 4 Peters, 506, that "A vendee in fee, derives his title from the vendor; but his title, although derivative, is adverse to that of the vendor. He enters and holds possession for himself, and not for the vendor." This doctrine has been fully recognized in *Massachusetts*, in the case of *Small v. Proctor*, 15 Mass. 495. And it is now held in New York, that the doctrine of estoppel, which had been formerly improperly applied to an action of dower brought by a widow against the grantee of her husband, or those claiming under him, was wanting in the vital principle of estoppel, which consists in mutuality.

The decisions in this country, in which the grantee and those claiming under him were held to be estopped to deny the title of the grantor, were cases in which the grantee received and held possession under the conveyance, and relied upon it as his source of title, and not where the grantee held the title under a prior and independent conveyance.

In the case before us Nathan Perry had purchased the land, received a conveyance, and was in possession prior to the conveyance from Job Doan, under a title upon which he, and those claiming under him, have relied since 1824. The conveyance from Doan was treated as of little or no value, and was plainly a mere measure of precaution on the part of Nathan Perry, by way of buying his peace and quieting his title. It would be the grossest absurdity to conclude that Nathan Perry, by taking the conveyance from Job Doan, for a trifling consideration, contemplated, instead of continuing seized of the whole premises, as he claimed to have been before, that he became seized of only an undivided part, in common with the other heirs of Job Doan's ancestor.

It would seem to be just and reasonable that a person in the *bona*

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vide possession of land under a claim of title, should be allowed to buy in any title, real or pretended, with a view to quiet the enjoyment of his possessions, and that *the purchase of an adverse title, if it does not strengthen, should certainly not have the effect to impair the title of the owner. It is not the policy of the law to deter persons from buying their peace, and compel them to submit to the expense and vexation of lawsuits, for fear of having their titles tainted by defects which they would gladly remedy by purchase, where it can be done with safety. [348

A claim to a dower estate in lands, upon a mere technicality, after a lapse of near thirty years, predicated on a tax title of the deceased husband, unsupported by any public record showing the validity or regularity of the tax sale, and under which the husband, in his lifetime, was not only never in possession, but never had asserted any right to the possession of the premises, is entitled to but little consideration in a court of justice. And my only surprise is, that I should have been induced myself, when presiding in the court on the circuit, by the urgent request of the learned counsel for the petitioners, to reserve the question in this case for decision by the court of last resort.

Petition dismissed at the costs of the petitioners.

OHIO MUTUAL INSURANCE COMPANY v. THE MARIETTA WOOLEN FACTORY.

Where a mutual insurance company was authorized by an amendment to its charter, to issue policies upon cash premiums, at the election of the applicant, which was to be taken in lieu of a deposit note, and the fund arising therefrom, together with the deposit notes, were declared to be the capital of the company for the payment of losses and expenses: *Held*—

1. That the fund arising from cash premiums was subject to the same application as the premium notes, and could not be diverted to the payment of losses accruing before such premiums were received.
2. That an assessment for the whole amount of losses accruing during the time such funds were received, made upon the deposit notes, without first exhausting the cash funds, as provided by law, was illegal and void.

ERROR to the district court of Washington county.

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349] *The facts of the case, and the questions involved, fully appear in the opinion of the court.

Swan & Andrews, and Swayne & Baber, for plaintiff in error.
P. B. Wilcox, and Goddard & Rhodes, for defendant.

RANNEY, J. This action was brought to recover certain assessments made upon a premium note given by the defendant to the plaintiff, to effect an insurance in the plaintiff's company upon certain property of the defendant's, and extending from May 14, 1851, to May 14, 1852. On trial in the district court, the plaintiff was nonsuited, and this writ is now prosecuted to reverse the judgment of that court. The questions presented arise upon the charter of the insurance company, and certain amendments thereto; and, while they are somewhat difficult and important, they do not seem to be of such general interest as to require an extended exposition of the several provisions of the statutes, upon which reliance is placed by the parties. I am the more ready to omit this, as the case was very critically examined by the judge who delivered the opinion of the court below (10 W. L. J. 466), in the general conclusions of which we concur.

The company was incorporated on the 11th of March, 1843, with the powers usually conferred upon mutual insurance companies. Every person insuring in the company became a member thereof during the term specified in his policy, and no longer; and, as such, was entitled to vote for all officers of the institution, and participate in the control of its affairs.

To effect insurance, he was required to deposit his promissory note for such sum of money as the directors might determine upon, and to pay at the time, not exceeding ten per cent. thereon, "for the purpose of discharging the incidental expenses of the institution, and the formation of a cash fund to meet losses promptly," the remainder being subject to the call of the directors, when requisite for the payment of losses or expenses. He thereby be-
350] came bound *to pay his proportion of all losses and expenses happening or accruing in and to the company during the continuance of his policy, and if the whole of his premium note was not in that manner exhausted, he was entitled to have the balance given up and discharged. No difficulty appears, or is suggested, in determining the liability assumed by the members, or the man-

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ner of apportioning and enforcing it, under the provisions of this charter.

On the 12th of March, 1844, however, it was amended by an act containing two sections, as follows:

"SEC. 1. That it may and shall be lawful for any person applying for insurance in the Ohio Mutual Fire Insurance Company at his, her, or their *election*, to pay to said company a certain definite sum of money, in full for such insurance; *which said sum shall be in lieu and place of a premium note*; and such person or persons shall not be liable to said company during the continuance of his, her, or their policy, for any sum beyond the amount thus originally paid.

"SEC. 2. That such sum or sums of money shall be retained as a fund for the payment of losses and expenses which may happen or accrue in and to said company, which said fund shall be exhausted before a resort shall be had to assessments upon premium notes deposited with said company; and this said fund and the premium notes deposited with said company, shall constitute the capital stock of the company, for the payment of losses and expenses: *Provided*, that no member of said company shall be liable for such losses or expenses to a greater amount than his or her premium note."

On the part of the plaintiff, it is claimed that this act entirely changed the essential character of the company from a purely mutual to a mutual stock company; the cash paid for premiums and the premium notes being the capital of the company, and subject to appropriation upon any of its liabilities, with this single limitation, that the cash must be first exhausted before assessments were made upon the stock notes. Acting upon this construction, the directors applied all the cash premiums received during the time the defendants were members, to pre-existing liabilities of the company, and made the assessments upon the members for the whole amount of losses accruing during that period.

In this, we think, they were most clearly wrong. No such radical change is, or was intended to be effected by this act. *It [351 was still a mutual insurance company, with no power in the directors to control its assets as an independent company, or to divert them from the purposes to which the law and the contract of the parties had appropriated them. Every person insuring, whether by the payment of a cash premium, or the deposit of a premium

note, still became a member of the company, and this act simply gave the "election" to him, whether he would become a member in the one way or the other; and if he chose the former, it expressly provides that the sum paid should "be in lieu and place of a premium note," and he should be liable to pay no more.

The second section devotes the fund thus raised and the premium notes to the payment of losses and expenses; requiring the cash fund to be first exhausted before resort is had to the premium notes. But to what losses, or in what manner, the section is entirely silent, and we are therefore remitted to the provisions of the original charter, which fixes the burden of a loss, at any particular time, upon those who are then members of the company. The amendment has effected no modification of these provisions further than to require it to be paid, so far as it can be, from cash policies before the premium notes are assessed. If that fund is sufficient to pay the loss, no assessment can be made; if it is insufficient, the balance is a debt against those who are then members of the company, by depositing premium notes, and must be assessed against and collected from them; and by no possibility can the burden be shifted, by postponing the payment, on to the fund arising from cash premiums afterward received. The cash premium belongs precisely where the premium note, whose place it takes, would belong; and is subject to the same appropriation with this modification; it must be first applied, and no part of it can be withdrawn upon the expiration of the policy, although it should not have been all expended. Any other construction would make the holders of policies issued upon premium notes, bear the losses of those who paid the premium in cash, without the benefit of the money received of 352] them, in lieu of premium notes. There would certainly be very little *mutuality* in that. There is no difficulty in the practical working of this construction. When a loss happens, the money on hand derived from cash policies must be ascertained. If it is enough to pay the loss, no assessment is required or authorized; if more than enough, the balance is carried forward, and allowed to accumulate to meet the next loss. If it is not enough, the balance is a burden, as I have said, on the premium notes on hand at the time the loss occurred.

The assessments in this case were therefore *illegal*, not simply erroneous. They were made upon an illegal basis, in violation of the law under which the directors derived their sole power to act.

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They are attempting to raise, by assessment on the premium notes, what the law expressly declares shall not be done. The large sum received for cash policies, after the policy of the defendants was taken, has not been legally exhausted. They have a right to demand that it shall be before they are called on for assessments, and they can then only be made liable for their proportion of the balance after such appropriation shall have been made.

The judgment is affirmed.

HENRY HOSS v. MOSES B. LAYTON.

Under the act for the prevention of gaming, of 1831, the loser of a bet may recover his money back, in an action founded upon the act, although commenced more than six months after the payment of the bet.

The act gives the loser the exclusive right of action the first six months; after that, it gives it to any one, whether the loser or another, who first sues.

RESERVED from the district court of Marion county, into which court the cause came by appeal.

The plaintiff declared in a plea of debt founded upon the act for the prevention of gambling, passed March 12, 1831, and took effect June 1, 1831, in the common pleas of Marion county. The first and second counts in the declaration *were as follows: For [353] that, whereas, the said Moses B. Layton, on the 10th day of November, A. D. 1851, at said county of Marion, was indebted, and still is indebted to the said Henry Hoss, the plaintiff, in the sum of five hundred and fifty dollars for money, before that time and within six months before the commencement of this suit, to wit, on the 31st day of July, A. D. 1852, lost by the said plaintiff, and by him the said plaintiff paid to the said defendant, to wit, at the county aforesaid, upon a bet and wager then and there made, by and between the said defendant and the said plaintiff, whereby an action hath accrued to the said plaintiff according to the form of the act aforesaid to demand and have from the said defendant the said sum of five hundred and fifty dollars. Yet the said defendant hath not paid the same, nor any part thereof. And also for that, whereas, on the said 31st day of July, A. D. 1851, at said county of Marion, and within six months before the commencement of this suit, the said

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defendant received for the use of the said plaintiff one other sum of \$550, being money then and there bet and wagered by and between the said plaintiff and the said defendant; and afterward, to wit, on the day and year aforesaid, at the county aforesaid, lost by said plaintiff, and paid to and received by said defendant as the winner of such bet and wager, whereby an action hath accrued to the said plaintiff, according to the form of an act entitled "an act for the prevention of gaming," passed March 12, 1853, to demand and have from the said defendant the said sum of \$550. Yet the said defendant hath not paid the said sum of money, nor any part thereof.

The common counts were the remainder of the declaration.

The defendant demurred to the first and second counts of the declaration; and to the other counts he pleaded that he does not owe said sums of money; and he further pleaded in this behalf, that as to the third count of his declaration, plaintiff ought not to maintain his action, because the supposed causes of action in said third count, are founded upon an act for the prevention of gaming, 354] passed March 12, 1831, *and did not, nor did either of them, accrue to the plaintiff at any time within six months next before commencement of this suit.

The plaintiff filed his joinder in demurrer, and demurred to the defendant's second plea.

The court overruled the defendant's demurrer to the first and second counts of the declaration, and sustained the demurrer of the plaintiff to the defendant's second plea.

The reservation in the district court was upon the pleadings only.

Bowen & Durfee, for the plaintiff.

J. & S. H. Burton, for the defendant.

THURMAN, C. J. There is no valid objection to either the first or the second count of the declaration. It was decided in *Veach v. Elliott*, 1 Ohio St. 139, that the act for the prevention of gaming (Swan's Stat. new ed. 439), comprehends every kind of bet or wager. And as to the form of the declaration, the 3d section of the act provides that it shall be sufficient in law for the plaintiff to allege that the defendant is indebted to the plaintiff, or received to the plaintiff's use the money so lost and paid, or converted the goods won of the plaintiff to the defendant's use, whereby the plaintiffs

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action accrued to him, according to the form of this act, without setting forth the special matter." The counts under consideration fully comply with what is here required, and consequently the demurrers to them must be overruled.

The second plea to the third count raises the question, or was intended to raise it, whether money lost and paid upon a bet can be recovered by the loser, in an action commenced more than six months after such payment? I say it was intended to raise this question, but whether it does so fairly, is not quite certain. For that count is the common indebitatus count for the price of goods sold, money had and received, etc., and contains no allusion whatever to any bet or to the gaming act. Under such a count, it is, to say the least, very doubtful whether a recovery could be had for *money lost upon a bet, and if it could not, the plea above [355 mentioned was neither necessary nor proper. But as this view is not taken by counsel, we are content to let it pass, and consider the question they designed to present.

The first section of the gaming act declares: "That all promises, agreements, notes, bonds, or other contracts, mortgages, or other securities, when the whole or any part of the consideration of such promise, agreement, conveyance, or security, shall be for money or other valuable thing whatsoever, won or lost, laid, staked, or betted, at, or upon any game or games, of any kind, or under any denomination or name whatsoever, or upon any horse-race, or cock-fight, sport, or pastime, or on any wager, or for the repayment of money lent or advanced at the time of any game, play, bet, or wager, for the purpose of being laid, betted, staked, or wagered, shall be absolutely void and of no effect."

By the 2d section it is provided :

"That if any person or persons, by playing at any game or games, or by means of any bet or wager, shall lose to any other person or persons, any sum of money or other thing of value, and shall pay or deliver the same, or any part thereof, to the winner or winners, the person or persons so losing or paying, or delivering, may, at any time within six months next after said loss and payment, or delivery, sue for and recover the money or thing of value so lost and paid, or delivered, or any part thereof, from the winner or winners thereof, with costs of suit, by action of debt, founded on this act, to be prosecuted in any court, or before any justice of the peace, having competent jurisdiction of the same."

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The 4th section is as follows:

"That if any person or persons, losing such money or thing of value as hereinbefore described, shall not, within the time specified, without collusion or deceit, sue, and with effect prosecute, for the money or thing of value so lost and paid, or delivered, it shall be lawful for any person, by such action or suit, to sue for and recover the same, with costs of suit, against any winner or winners as aforesaid, for the use of the person prosecuting the same."

On the part of the defendant, it is contended that these provisions limit the right of the loser to sue to the six months succeeding the payment of the bet; and, in support of this proposition, we are referred to the case of *Vaughan v. Whitcombe*, 5 Bos. & Pull. 413. In that case, it was held that the statute 9 Anne, c. 14, "which 356] avoids all securities for *goods or money lost at unlawful games, and gives the loser a power to recover back the same within three months, does not make the contract void, but voidable only, and therefore, the loser can not recover them after three months, though the winner can show no title to them, except what arises from having won them at play." For, at common law, such title would be good, 4 Bac. Abr. 450, and as the statute did not prohibit betting, or make the wagering contract itself void, but only any securities given in pursuance of it, the plaintiff who sued, not upon the statute, but at common law, in trover for the property, clearly had no right to recover. Had he brought an action under the statute after the expiration of the three months, to recover the damages given by the act, the case would be somewhat analogous to the present. But, even in such a case, I imagine he could not have recovered. For, had he sued within the three months, he could only have recovered the value of the money or property lost and paid; whereas in the *qui tam* action given by the statute to any person or persons, upon the loser's failure to sue in three months, treble damages were given, one-half to the informer, and the other to the poor of the parish. To have held, then, that the loser could prosecute such a suit, would have been a direct inducement to losers not to sue within the three months, as their damages would be greatly enhanced by suing afterward. The policy of the law would thus, in a great measure, have been defeated, and a construction given to the act that could not have been designed by Parliament.

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But our statute, though to a great extent copied from that of Anne, is much more comprehensive, and in some of its provisions very different. It avoids not only the security given upon a gaming consideration, but the gaming contract also. Both are declared void, and, in addition to this, the gamesters are subjected to criminal punishment. But what is more deserving of note here, it gives to the informer, who sues, no greater damage than the loser could recover, and, therefore, there is not the implication arising upon the statute of Anne against the loser's right to sue after [357] the specified time.

It would seem to be clear, then, for the reasons I have stated, that the case of *Vaughan v. Whitcombe* does not support the present plea.

• Among other points made for the plaintiff, it is argued that he has a right to recover his money, because he paid it on a void consideration; and it is said that it matters not whether the consideration is void by the common law, or made so by statute. But I apprehend that, without the aid of the statute, he would be clearly remediless. He lost his money in an illegal transaction, to which he was a party, by the commission of an offense against the criminal law. He executed the illegal contract by full payment, after which the common law would leave him just where he had placed himself. *Raguet v. Roll*, 7 Ohio (pt. 1), 78; *Doe ex dem Raguet v. Roll*, 7 Ohio (pt. 2), 70; *Goudy v. Gebhart*, 1 Ohio St. 262.

The question then is, what right of action does the statute give him? It gives him expressly a right to sue within six months (sec. 2); and if he fail to do so within that time, it then authorizes "any person" to sue (sec. 4). The language is not any other person, but simply "any person." This is evidently comprehensive enough to include him, and we see nothing in the act to authorize us to exclude him by interpolating the word *other*. The object of the statute seems to be to give the loser the exclusive right of action the first six months; after that, to give it to any one, whether the loser or another, who first sues. The six months provision is therefore no bar to this suit. The only bar, by lapse of time, is found in the general act of limitations. These views are supported by the reasoning of Chancellor Kent in a somewhat analogous case, *Palmer v. Lord*, 6 Johns. Ch. 102, 103, in which it was held that a party who had paid usurious interest might recover it back by

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suit commenced after one year from the payment, although the provision of the statute was, "that when a higher rate of 358] *interest shall have been paid, the borrower may recover back the excess, by an action of debt at law, within one year next after the payment; and in case the party aggrieved does not sue within the year, any *other* person, within a year after such neglect, may bring a *qui tam* suit for such usurious excess."

The same construction that we now give to our act has been given by the court of appeals of Kentucky to their statute of 1833, which is not more favorable to the loser than is ours. *Faris v. Kirtley*, 5 Dana, 460.

The demurrer to the plea must be sustained, and the cause remanded to the district court for trial.

HENRY MARKS ET AL. v. WILLIAM H. SIGLER ET AL.

Where defendants are sued as partners, and liable only as such, and where they had before that time been sued as such partners, and suffered judgment to pass against them by default as such by other persons, the record of such judgment may be given in evidence against them, as tending to prove the partnership.

ERROR reserved from the district court of Crawford county.

The facts of the case, and the questions involved, appear in the opinion of the court.

William H. Gibson and *S. R. Harris*, for plaintiff in error.

C. K. Watson, for defendant in error.

The facts of the case are as follows :

KENNON, J. The plaintiffs, in June, 1851, brought an action of assumpsit against defendants on three promissory notes, dated April 13, April 15, and September 1, 1850. These notes were signed in the firm name of William H. and S. A. Sigler & Co.

The plaintiffs sued William H. Sigler, Stephen A. Sigler, and 359] Jacob Sigler, claiming that Jacob was a member of the *firm.

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Jacob Sigler alone answered; he filed a plea of non-assumpsit, verified by affidavit.

The only question in dispute was, whether Jacob was a partner.

On the trial of the case, the plaintiffs, for the purpose of proving the partnership, offered in evidence the record of a judgment obtained by Ward, Peck & Co., against the three Siglers, *as partners*, and a man by the name of Simon Swineford, *by default*. That action was commenced in October, 1850, on a note dated June 4, 1850. The summons issued in the case, commanded the sheriff to summons William H. Sigler, Stephen A. Sigler, and Jacob Sigler, *partners by the name and firm of William H. and S. A. Sigler & Co.*, and Simon Swineford.

Upon the summons was the following indorsement: "Suit brought on a joint and several note by defendants to plaintiff, for \$118, dated New York, June 4, 1850, due four months after date," etc. The record of the judgment shows that the summons was returned, with the following indorsement thereon, made by the sheriff: "Served this writ October 28, 1850, on each of the within-named, William H. Sigler, Stephen A. Sigler, and Jacob Sigler, and Simon Swineford, by leaving a certified copy of this writ at their places of residence."

At the June term, 1851, of the court of common pleas of Crawford county, judgment was rendered by *default* against the defendant for the amount of the note. The record showing the above facts was offered in evidence by the plaintiffs in this suit. The defendant, by counsel, objected to its admission, and the objection was sustained by the court. The plaintiff *excepted* to this ruling of the court. The jury found a verdict for the defendant, and judgment was rendered accordingly.

To reverse the judgment for the supposed error of the court in ruling out this record, and for *other causes*, this writ of error is prosecuted.

*Did the court err in refusing to admit in evidence the record of the judgment thus obtained by Ward & Co., against the three Siglers, in which they were charged as *partners*, and suffer judgment to pass against them by *default*, is the only question which we consider necessary to determine. [360

Two of the notes upon which the plaintiffs sought to recover judgment, were dated before, and one about *three months after* the note upon which Ward & Co. obtained judgment by default.

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It is scarcely necessary to say that the plaintiffs had a right to prove that the Siglers were, in fact, partners, three months before the date of the note upon which suit was brought; for the presumption would be, that they continued to be partners until the date of one of the plaintiff's notes.

An admission made by the three Siglers, that they were partners, would be strong evidence of the fact. If they had been sued as *partners*, for the recovery of money, and had all three gone into court and confessed judgment, can there be any doubt at all but that such confession would be some evidence of the fact confessed; especially when we consider that the confession of judgment was *against* their interest? If an action had been brought against them as partners, and it had been sought to charge them as such, and they had *actually* been *present* in court, and permitted judgment to be taken against them by *default*, it would be difficult to see why that was not a tacit admission of partnership. If they in fact were not partners at the time, and not liable to judgment against them as such, what plausible reason could be assigned for such conduct? None whatever. But, in the supposed case, it could make no difference whether they were *actually* present in court or not at the time judgment was taken by default, if they knew of the pendency of the suit, and that they were charged as partners, and permitted judgment to be taken against them by default.

Without, therefore, looking to any authorities upon the subject, 361] it seems to us, that persons charged by action in court with being partners, and omitting to make any defense, and permitting judgment to be taken against them for money by *default*, is proper evidence of the existence of the partnership; evidence *tending* to prove a partnership, equally as strong as if the plaintiff had called upon them in the street, and said to them, "you are partners in business, and as such you owe me \$1,000," and they had, without saying a word, paid the money; and yet it would hardly be doubted that in the instance last stated, their acts might be given in evidence to prove they were partners.

It is said, however, that it is a *rule* of the law of evidence, that judgments bind nobody but parties and privies; and when offered in evidence, they must be between the same parties or privies, and upon the same points in controversy at the trial; that they can not be used as instruments of evidence against strangers to the record, for the reason that such strangers have not had a day in court, and

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have had no opportunity of controverting the matters in issue, and upon which the judgment was rendered. For the same reason, it is said a stranger can not use a judgment against either of the parties to the judgment. They could not use the judgment against him, and he shall not be permitted to use it against them.

These rules of law are based on sound reason, and ought not to be disturbed; but what do we mean by saying the JUDGMENT is not evidence in such cases? Simply that the facts *found* by the court or jury to be true, and upon which judgment was rendered, are not to be considered as tried in any other cases than those between the same parties, and when the same matter is again in controversy. But in this case the plaintiff was not attempting to prove that the facts found by the court were true; nor to show *what* the court or jury did or did not find, but simply to show what the parties *defendants* did not do; namely, plead to the action then *pending* in court. You can show that such action was pending *only* by the record itself, for, by another well settled' rule, you are not permitted to prove it in any other way. *The record when [362 produced, however, is necessarily evidence of its *own existence*, at least *prima facie* evidence that the parties were properly in court.

There are several decided cases in the Maine Reports, sustaining the doctrine contended for by the plaintiffs' counsel. Indeed, in that court it is considered settled law that if parties are sued as partners, and permit judgment to pass against them by *default*, the record of such judgment may be given in evidence in a suit by other parties against the same defendants, for the purpose of proving a partnership. See Fogg et al. v. Greene et al., 16 Maine, 282; Ellis v. Jamison, 17 Maine, 235; Craig et al. v. Carlton et al., 21 Maine, 492. It is supposed, however, that these decisions are placed upon the ground that by permitting judgment to go by default the defendants hold themselves out to the world as partners, and justify others in dealing with them as such, *after the default*. But by an examination of these cases, and especially of the facts of the cases, it will be found that the decisions could have been placed upon no such ground. Indeed, it would be difficult to understand how the fact of allowing judgment by default to be taken against defendants as partners, would be *sufficient evidence* to justify the world in considering them as partners, and holding them responsible as such, and yet would be *no evidence* at all in a court of justice that they were partners.

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We are of opinion that the court of common pleas ought to have permitted the record to be given in evidence, and that there is error in refusing to do so.

The judgment is reversed.

WARDEN, J., dissented.

MATTHEW MACKEY v. THE STATE OF OHIO.

An indictment purporting to be by "the grand jurors of the State of Ohio, inquiring of crimes and offenses within and for the county of Monroe," must be taken as found by a grand jury of that county, as well as for the state; and is, therefore, found by such a body as the law intends.

363] *The 22d section of the act providing for the punishment of crimes, passed March 7, 1835 (1 Curwen, 189), is neither inconsistent nor repugnant.

An allegation of uttering a "false, forged, and counterfeited bank-note," is not bad for repugnancy. Stoughton and Hudson's case, 2 Ohio St., followed.

ERROR to the district court of Monroe county.

The opinion of the court embraces all the facts and questions in the case.

S. Hollister, for plaintiff in error

Attorney-General, for the state.

WARDEN, J. The plaintiff in error pleaded guilty to an indictment found in Monroe county, charging him with aiding, assisting, and procuring one Thomas Mackey to utter a "false, forged, and counterfeited bank-note," set forth in the indictment, and he was sentenced to be imprisoned in the penitentiary.

To reverse the judgment, he sued out of the district court a writ of error to the court of common pleas, and assigned for errors :

1. The indictment is defective in purporting to be the act of the "grand jurors of the State of Ohio."

2. It charges the bank-note to have been "false, forged, and counterfeited," which words, in the description, are said to be repugnant.

3. The 22d section of the act entitled "an act providing for the punishment of crimes," passed March 7, 1835 (1 Curw. 189), under

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which plaintiff in error was indicted, or so much thereof as relates to the charge set forth in the indictment, is inconsistent, repugnant, and therefore void.

The district court reserved the cause for decision here.

Examining the assignments in reverse order, we are of opinion :

I. That there is no such inconsistency or repugnancy in the act itself as appears to counsel.

The statute defining the offense which this indictment charged the plaintiff in error with aiding another to commit, *uses [364 the following language: "That if any person shall falsely make, alter, forge, or counterfeit any record or other authentic matter of a public nature, or any charter, letters patent, deed, lease, writing obligatory, will, testament, annuity, bond, covenant, bank-bill or note, check, draft, bill of exchange, contract, or promissory note, for the payment of money or other property," etc.; "or shall utter, or publish as true and genuine, or cause to be uttered and published as true and genuine, any of the above-named false, altered, forged, or counterfeited matter, above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud, any person or persons, body politic or corporate," etc.

We are referred, by counsel for plaintiff in error, to the case of *United States v. Cantril*, 4 Cranch, 167, as declaring void an enactment to which the section cited from our own statute is similar. But, on examining the statute of Congress, which was, in the case named, held to be inconsistent, repugnant, and void, we find no similarity whatever between any part of our statute and those absurd provisions of the act of Congress which destroyed themselves. The act, passed June 27, 1798, and entitled "an act to punish frauds committed on the Bank of the United States" (——), provided, among other things: "If any person shall utter, or publish as true, any false, forged, or counterfeited bill, or note, *issued by order of the president, directors, and company of the Bank of the United States, and signed by the president, and countersigned by the cashier thereof, with intention to defraud the said corporation, or any other body politic or person,*" etc. A mere reading of this statute, reveals its absurdity in attempting to describe as forged matter the genuine notes of the bank, signed by its officers, and to punish the uttering of such notes as a fraud on the bank by order of whose very officers the "forged" notes were issued. Here is a

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blunder, not of intention, but of words. The absurdity was soon removed by proper legislation on the part of Congress.

365] *It is possible that the language of the first assignment of error in the case of Cantril, together with the brief statement of the reporter, that "Marshall, C. J., delivered the opinion of the court, that the judgment ought to be arrested, for the reasons assigned in the record," may have misled counsel as to what was really decided. But whatever may have been the intended significance of the stress laid on certain words in that assignment, a careful examination of the whole case will show that it is no authority for holding such a statute as ours to be inconsistent or repugnant. No such law as that which a legislative blunder caused to be enacted by Congress could be enforced. But our statute is not in any sense inconsistent or repugnant, and, though not very skillfully drawn, has long been understood and enforced by all our courts.

II. But it is said the allegation of uttering a "false, forged, and counterfeited bank-note" is bad for repugnancy. And here is a question on the statute, as to which opposite opinions have, to some extent, been manifested. But the sufficiency of such an allegation as that before us was one of the points decided in a case reported at the last term. In *Stoughton & Hudson's case*, 2 Ohio St. 562, the indictment was held good in respect of the allegation here objected to as repugnant. In the opinion of the judge who pronounced the judgment of the court in that case, a willingness on the part of a majority of the court to reconsider Kirby's case, reported in 1 Ohio St. 185, is intimated, and the conviction of that member of the court declared that the ruling in Kirby's case was erroneous. In this case, the attorney-general has urged us to review and reverse that ruling; and if the record before us called for such review, we should not hesitate to examine what was decided, as well as the reasoning of the judge who delivered the opinion of the court in Kirby's case. But the question we are now examining being within the ruling in *Stoughton & Hudson's case*, we content ourselves, for the present, with following the last-named decision.

366] *III. The sufficiency of the denomination and description of the grand jury is the only remaining subject of question.

The diversities shown by our criminal practice and pleading, throughout the state, are very striking; and it is astonishing that even such a thing as the denomination of the grand jury should vary in different localities. In some, the grand jurors are styled

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"of the county of ———," and present their indictments "in the name and by the authority of the State of Ohio." In others, a form like that here used is constantly followed. The distinction is not important in our view. We think it not unreasonable to hold that a grand jury, inquiring of crimes in the county of Monroe, must be a grand jury of that county, as well as of the state; and, if so, it is such a body as the law intends.

Judgment affirmed.

MARTIN M. MACK v. WILLIAM D. BONNER.

The statute regulating appeals to the district court, passed March 23, 1852, authorized an appeal on petition for partition..

PETITION for partition. Appealed from the common pleas to the district court of Knox county, and reserved in the district court for decision here, on a motion to dismiss the appeal.

The petitioner, Martin M. Mack, filed his petition, under the statute, for partition in certain real estate, in the Knox county common pleas, where the petition, on hearing, was dismissed. From this decision, the petitioner appealed to the district court, and the defendant, Bonner, moved to dismiss the appeal in the district court, on the alleged ground that it was not authorized by law.

Israel & Galusha, for plaintiff.

Vance & Smith, for defendant.

*BARTLEY, J. The only question presented by the motion [367 in the district court, on which this case was reserved, is whether the statute regulating appeals to the district court, passed March 23, 1852, authorized an appeal in a case of this kind. The statute provides for appeals from all final judgments in *civil cases* at law, decrees in chancery, and interlocutory decrees dissolving injunctions rendered by the court of common pleas, in which that court had original jurisdiction. If, therefore, a petition in partition be a civil cause, in which the court of common pleas had original jurisdiction, the right of appeal existed. A petition for partition is neither a suit in chancery, nor a common-law action, but a civil suit or proceeding

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prescribed by statute. The expression "*civil cases at law*," in the language of the statute, distinguishes a class of remedies from suits in equity, and the criminal and quasi criminal modes of procedure, and comprehends *all civil cases at law*, whether the action be given by statute, or existed as common law. Giving, therefore, the expression "*civil cases at law*," its proper meaning, it includes a petition for partition, as well as the various other suits or actions authorized by statute. The only serious objection made to this construction of the statute, is, that it would include mere motions and summary proceedings, in which appeals should not exist, unless it be in the form of petitions in error. Mere motions or summary proceedings, based upon other matters before the court, clearly do not belong to the class of remedies by original suit or action, designed to be comprehended by the expression, "*civil cases at law*." Neither is the proceeding under the bastardy act, to which counsel have referred in argument, included, which is a proceeding originating under the jurisdiction of a justice of the peace, and quasi criminal in its nature.

It is urged on behalf of the motion, that the statute authorizing appeals from the common pleas to the Supreme Court, under the former constitution of the state, was not substantially different from the present statute on that subject; and that according to the adjudications of the Supreme Court, the right of appeal was limited to actions at law and suits in chancery, and did not extend to any of the remedies prescribed by statute; and by an express decision on the question, in the case of *Hay v. Hites*, 11 Ohio, 254, did not extend to petitions in partition. The decisions of the Supreme Court, under the former constitution, upon this subject, gave an interpretation to a different statute from that now under consideration, and therefore, although analogous, is not strictly binding in this case. On account of the condition of the business in the Supreme Court, and the peculiar organization of the judiciary under that constitution, a construction was given to the statute authorizing appeals fully as strict and rigid as would be justifiable in case of penal enactments. We have been disposed to view this subject somewhat differently, and have, therefore, treated the statute authorizing appeals, as *remedial* in its nature, and by the ordinary and settled rules of construction, as being entitled to a liberal interpretation. This is the view expressed upon the subject in the case of

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Hubble v. Renick, 1 Ohio St. 172. And in accordance with this interpretation, it was held, in the case of Knoup v. The Piqua Bank, 1 Ohio St. 604, that the statute authorizing appeals in *all civil cases*, applied to *all civil causes*, whether the form of the suit was prescribed by statute, or existed at common law. And there appears to be a peculiar propriety in adhering to this interpretation of the statute on the subject of appeals, at this time, inasmuch as the code of civil procedure, recently adopted in this state, has dispensed with all actions at common law and suits in chancery, and left parties in all remedies by suit in court, to the forms of remedy prescribed by statute.

The motion to dismiss the appeal is therefore overruled, and the cause remanded to the district court.

***RACHEL COLLIER V. JAMES COLLIER'S EXECUTORS ET AL. [369]**

A will and codicil are to be taken and construed together, as parts of one and the same instrument, and the intent of the testator gathered from the whole.
A codicil will not be held to revoke the dispositions of a will, further than is clearly expressed or necessarily to be inferred from it.

A bequest to the wife of a testator of one-third of his real and personal property, directed to be sold and converted into money by his executors, is not impliedly revoked by a codicil which reserves from sale a part of such real property until her death, and secures to her the use of it during her life.

Where a part of such personal property consisted of stocks, which were by the codicil directed to be reserved from sale, and the executor directed to pay over the dividends as they accrued to the "heirs" of the testator: *Held*, that the bequests of the will were not revoked.

In such case, when the intention is manifest, the word "heirs" may be construed to mean legatees.

An unconditional bequest of the dividends of the stock is a bequest of the stocks themselves.

Land directed to be sold and converted into money are treated in equity as personal property.

A widow electing to take under a will containing provisions for her, expressed to be in lieu of dower and all other claims on the estate of the testator, is not barred of her right to the year's support, provided by law, from the estate of the testator.

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CHANCERY; reserved in the district court of Greene county.
The opinion of the court furnishes a full statement.

Ellsbury & Sexton, and Stanton & Allison, for complainant.
Smith & Stanberry, for respondents.

RANNEY, J. This case requires a construction of the will and two codicils thereto of James Collier, late of Greene county, deceased. The complainant is his widow, and the defendants his executors and legatees.

The will was executed on the 15th day of February, A. D. 1845 and with the exception of a house and lot in Bellefontaine, which was devised absolutely to the complainant, it directed the executors to sell and convert into money all his real and personal property; 370] the one-third of which, after *paying his debts, etc., he gave to the complainant "in her own right, to her and her heirs forever, and to sell and dispose of, or use for her own benefit, in lieu of dower and all other claims on my estate." The remaining two-thirds he divided equally between his brother, Moses Collier, and the children of his sister, Agnes Park, then deceased. Among the property then owned, or subsequently acquired by him, were several town lots situated in the town of Xenia, and about four thousand dollars of stock in the branch bank of that place, and in the Columbus and Xenia Railroad Company. On the 1st day of April, 1851, he executed the first codicil, in which, after reciting that he had by his will directed all his real property to be sold, he says: "It is now my desire, and my said executors are directed, to except from said sale the property wherein I now reside, which I wish reserved for the use and benefit of my beloved wife, Rachel Collier, during her natural life; and my said executors are hereby directed to sell, of the property lying west of Detroit street, in Xenia, so much of the ground only as lies west of a line drawn from the alley between Galloway and Crumbaugh's lots north to Market street, so as to leave all east of said line to be sold at the decease of my said wife."

In relation to the bank and railroad stocks, this codicil provides: "It is also my desire, and my said executors are hereby accordingly directed, to reserve from sale my bank and railroad stock, and pay out the dividends which may come to their hands for distribution, to my heirs, so soon as they may receive such dividends."

On the fifth of the same month, and shortly before his death, he executed the second codicil, in which he gives and bequeaths to his

wife, during her natural life, a piece of ground near the town, then used as a pasture-lot. The testator died without children, leaving the complainant, his widow, and his brother Moses, and the children of his sister Agnes, his only heirs at law. The appraisers of the personal property belonging to his estate set off to the widow, under the statute, property to the value of \$524, for her year's *support, and within the time allowed by law, she duly elected [371 to take under the will.

The house that the testator occupied at the time the first codicil was made is situated on lot No. 59, which lies on the westerly limit of the land reserved from sale. He also owned a part of lot 60, which lies between lot 59 and Detroit street. We have no difficulty in holding the complainant entitled to the use of both these lots during her life. There is nothing in the will to indicate an intention to confine her to the lot on which the house stood. She is to have the property whereon the testator then resided; and he clearly indicated what he regarded as such by withholding from sale all east of the designated line until her death. It is equally clear that when that event happened, he expected this part of the property would then be sold, in accordance with the directions given in his will. He intended to postpone the sale until that time, but not to revoke the previous authority given his executors when that event should happen. His language is too explicit to admit of doubt. The reservation is to operate "so as to leave all east of said line *to be sold* at the decease of my said wife."

The questions presented by the parties are:

1. To whom will the proceeds arising from the sale of these lands, at the death of the wife, belong?
2. Who is entitled to the bank and railroad stocks? And,
3. Is the widow entitled to retain, without account, the property set off for her year's support?

The intention of the testator, derived from a careful consideration of what he has committed to writing in the will and codicil, must answer the two first questions, and our statute law the last.

I. On the part of the complainant, it is claimed that she has a present vested interest in one-third of the proceeds of these lands, which she may dispose of by sale or last will and testament; and if not so disposed of, that it would, upon her death, go to her heirs; that she is entitled to the whole *of the stocks as the [372 "heir" of her husband, who left no children; and that she has not

relinquished her right to a year's support by electing to take under the will.

These claims are all resisted by the defendants, who, on their part, insist that the provisions of the codicil are entirely inconsistent with the bequest of one-third of the proceeds of these lands to the widow by the will, and must be held to have revoked it; and, as a consequence, that the lands or their proceeds, at her death, descend or are distributed to Moses and the children of Agnes, as the lawful and only heirs of the testator; that, because they are such heirs, they are the persons designated in the codicil as entitled to all the stocks; and that the complainant, by electing to take under the will, relinquished all claims upon the estate not provided for in it, and consequently all claim for a year's support

In endeavoring to elicit the intention of the testator, the will and codicils must be read and considered together. *Negley v. Gard*, 20 Ohio, 315. Chancellor Kent, in *Westcott v. Cady*, 5 Johns. Ch. 343, lays it down "as a clear and settled rule, that a will and codicil are to be taken and construed together, in connection with each other, as parts of one and the same instrument;" and that "the intent of the testator is to be gathered from the whole, and a codicil is no revocation of a will, further than it is expressed." This results from the very nature and office of a codicil, which is made to be added to the will, to enlarge, restrict, or modify some of its provisions, and not, like a later will, to stand in the place of, or supersede it.

The will, in this case, is clear and explicit. It gives the executors full power to sell and convert into money, all his real and personal property, except such of the personal property as the widow chooses to take at the appraisement. It then bequeathes to her absolutely one-third of the proceeds "in her own right, to her and her heirs forever."

Now, if the substance of these codicils had been added to the will at the time it was made (and they must be construed as 373] though they had been), they could have been held to restrict its provisions no further than to postpone the sale of some portion of the real estate until the death of the widow, and in the meantime to secure the enjoyment of it to her. There is not one word used that indicates an intention to deprive her of one-third of the property, so explicitly conferred by the will. Nor can we see any reason, consistently with the testator's declared intention,

that there should have been. His wife was then over seventy years of age. The property had all been acquired during their intermarriage, and she may be fairly supposed to have contributed to its acquisition in the full proportion secured to her by the will of the husband. A just sense of what was due to her seems to have controlled him when he put one-third of it subject to her absolute disposal, naturally supposing that what was not wanted for her comfort during the short remnant of her days, would, by her appointment, or the regular course of descent, find its way into her family. He lived six years longer, and the great age of his wife, at that time, undoubtedly suggested to him the propriety of permitting her to occupy the homestead for the balance of her life; but we can not suppose that this slight boon, accorded by an affectionate husband to the very aged partner of his youth, was intended to annul the just division that he had previously settled upon between her and his kindred, and her blood and his blood.

It is a settled rule of construction, that a testator is never presumed to intend to die intestate as to any part of his estate to which his attention seems to have been directed; and a court of equity will put such a construction upon equivocal words as to prevent such a result. *Maberly v. Strobe*, 3 Ves. 450; *Booth v. Booth*, 4 Ves. 403. It is certain that but two-thirds of the proceeds of these lands is given by the will to the brother and children of the sister of the testator. If they can reach the remaining third, it can only be done upon the assumption that he died intestate as to that, and as his heirs. To say nothing of the great improbability that he would, with his mind directly upon the subject, *have failed [374 to designate who should take so large a portion of his estate, if he intended to change the disposition of his will, it is by no means clear that the establishment of such intestacy would not give the same interest to the widow as she now claims under the will. In *Ferguson v. Stuart's Ex'rs*, 14 Ohio, 140, it was held that land, directed by will to be sold and converted into money, is treated as personal estate, and governed by the statutes of distribution as such; and by the 180th section of the administration law (*Swan's Stat.* 389), the widow is entitled to the whole of the personal estate where the intestate has left no legitimate child. But it is unnecessary to decide what might have been her rights in such case, as we are clear in the opinion that the will disposes of the

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whole, and that there is nothing in the codicil to annul any of its dispositions.

II. The next question presented arises on the bank and railroad stocks. There can be no doubt that the devise of the dividends of these stocks, without limitation as to time or other qualification, carried the stocks themselves. 7 Cranch, 173; 3 Wheat. 563; 4 Kent Com. 54, and cases cited. The question is: To whom? Being a part of the personal estate, they were, by the will, directed to be sold and divided into three parts with the proceeds of the other property. In the first codicil, the testator says it is now his desire that his executors should reserve them from sale, and pay over the dividends, as they accrue, to his "heirs." The widow says she is such heir, *quoad* the personalty, and therefore they belong to her.

The other legatees insist that she does not answer the description; that the testator has used the word in the plural, and whenever he spoke of the complainant, he has designated her as his "wife;" and that they alone, as the persons to whom the real estate would descend, can be supposed to have been in the mind of the testator. We can not adopt either conclusion, because we do not think either correctly interprets the intention of the testator. [375] *Recurring again to the principle that this codicil is to be read as a part of the will, it is certain that no revocation of the bequest there made to either of the parties is expressed. If the reservation of these stocks from sale had been made in the will, in connection with an equal distribution of all his property, no one can doubt that he intended by the word "heirs," those to whom he had given the property, and that he had used it as equivalent to legatees; and this, we think, is precisely what he did mean. The codicil bears evident marks of being drawn by an unpracticed hand, and it is nothing remarkable that a careful discrimination was not made between a class of persons who would take by descent or distribution, and those designated to take by will. Nor was the word an entire departure from the strict legal idea intended to be conveyed. They were all in some sense his heirs—the widow as to the personalty, and the other legatees as to his real property, had he died intestate. The question is not, what does the word in strict propriety mean, but what did the testator mean by it? As was well said by the court in *King v. King*, 15 Ohio, 561, where the word was held to mean children, "a testator

may use such words as he may please to convey his intention; and such intention, if clearly manifested, will be carried into effect, if it be not unlawful, and does not create an estate forbidden by law." We are satisfied it was no part of the testator's object to interfere with the bequests he had made in his will, but being now satisfied that it would be for the interest of all concerned to suffer the investment to remain in these stocks, he simply directed his executors to take that course and pay over the dividends as they accrued.

III. We also think the widow entitled to her allowance for a year's support, notwithstanding her election to take under the will. By the 45th section of the administration law, the appraisers are required to set off, and allow to the widow and children under the age of fifteen years, sufficient provisions, or other property, to support them for twelve months from the death of the decedent; which are not to be included *in the inventory, but returned [376 with it in a separate schedule, signed by the appraisers. This is to be done in every case, whether there is a will or not; and the property so set off is withdrawn from the estate, and constitutes no part of the fund to be administered by its representative. This return is to be made within three months, while the widow has six months within which to determine whether she will take under the will or not. The allowance is designed for the support of herself and children during the year that the executor may retain all the assets of the estate, awaiting the presentation of debts against it, and while she has no power to compel him to pay over any legacy to her, however ample it may be. If there are children they too have an interest in the provision, that ought not to be taken away by reason of any benefit secured to the widow alone by the will.

Let it be granted that the husband intended to deprive the widow of this allowance, if she took under his will; still, as the law gave it to her, has the law anywhere given the husband power to take it from her, or to make it a condition upon which she may claim the property given to her by his will? We think not. All the legislation to which we have been referred, relates exclusively to her rights of dower, and the distributive share to which she would be entitled in her husband's estate. The 45th and 46th sections of the act relating to wills, passed March 23, 1840 (Swan's Stat. 998), governs this case. The 45th section puts the widow to her election, whether she will take the provision made in the husband's

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will, "or be endowed by his lands;" and the 46th declares that if she "fail to make such election, she shall retain her dower, and such share of the personal estate of her husband, as she would be entitled to by law, in case her husband had died intestate;" but "if she elect to take under the will, she shall be barred of her dower, and take under the will alone." Neither in this nor any of the amendatory acts, is any reference made to this temporary allowance. In performing their duty, the appraisers have no right 377] to know *whether there is a will or not; and if they do know there is one, they can not know whether the widow will claim the benefit of its provisions. They must still perform the duty of setting off property enough for the year's support, which effectually separates it from the estate, in accordance with the absolute disposition which the law makes of it, irrespective of the claims of creditors or legatees, and without regard to what may have been the wishes or directions of the decedent upon the subject.

A decree may be taken, placing a construction upon the will in accordance with these views, and remanding the cause to the district court for final disposition.

LESSEE OF JOHN MITCHELL ET AL. v. TIMOTHY RYAN.

The record of a deed is *prima facie* evidence of its delivery.

Such *prima facie* case may be rebutted by proof.

A delivery of a deed may be to a stranger for the use of a grantee.

It must appear that such delivery was for the grantee's use. But no precise form of words is necessary to the declaration of this purpose. Anything that shows the purpose is enough.

When a man executes and acknowledges a deed, and delivers it to the recorder, with unqualified instructions to record it, the reasonable presumption, in the absence of any rebutting circumstance, is, that he means to part with his title.

The fact of a grantor's possession of a deed, after an alleged delivery of it, may be a very pregnant circumstance, to show that the supposed delivery was not absolute. But such possession of a recorded deed is entitled to much less consideration than the possession of a deed not recorded.

Clear proof ought to be made to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title.

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It is a general rule that acceptance by the grantee is necessary to constitute a good delivery.

But where a grant is plainly beneficial to the grantee, his acceptance of it is presumed in the absence of proof to the contrary.

And when a grant is a pure, unqualified gift, the presumption of acceptance can be rebutted only by proof of dissent.

*As between grantor and subsequent purchasers under him, and his [378 grantee, a deed recorded before any such subsequent purchase, and not impeached for fraud, may be shown to be a gift, notwithstanding the consideration expressed in it is pecuniary.

A. husband may be tenant by the curtesy, though the wife was never seized in deed, either actually or constructively, and though the land was adversely held during the coverture, by another person. *Borland v. Marshal*, 2 Ohio St. 308, approved.

RESERVED in the district court of Perry county.

The action is one of ejectment, and is in this court by agreement of parties, on the facts appearing in the notes of Judge Whitman taken at the trial in the common pleas, and the deposition of Margaret Shanon. From the judge's notes, it appeared that the plaintiff first offered a deed from Owen Shanon to Ellen Shanon, for the land in controversy. This deed, dated April 2, 1838, was left with the recorder of Perry county, April 6, 1838, and was actually recorded, April 11, 1838. It was agreed that Owen Shanon was the common source of title. The marriage of Ellen Shanon to John Mitchell, January 7, 1840, was admitted. Her death was also admitted. The possession was admitted always to have been in Owen Shanon, or the defendant Ryan. The defendant offered in evidence a deed from Owen Shanon and wife, to him, Ryan, dated July 27, 1847, recorded February 14, 1850. Owen Shanon, the grantor, testified in substance as follows: "Ellen Shanon was my daughter; at the time of the deed to her, she was in the east; she knew nothing of it; no consideration passed, and she never had any knowledge of the conveyance; she was born in 1823; a year after the execution of the deed, she came to Ohio; she was married in about two years after the conveyance; at this time I was in possession; I continued in possession until I contracted to sell to one Kinney; he took possession and made improvements; left, and gave up the contract; then Patrick Haughran went in under verbal contract with me, and made improvements; he left; I then sold to Timothy Ryan; he paid me two hundred dollars; Ryan never *moved on the [379 place; my daughter lived a mile from the place after her marriage; she died last spring or fall."

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It was agreed that the taxes were always paid by Shanon till the sale to Ryan.

Henry Green testified that a short time before the last term of the court, Mitchell had no knowledge of the deed to his wife; Duffy told him; this was just about the time of the death of the wife.

Owen Shanon being recalled, testified that he sent the deed by mail, from McConnellsville to Somerset, to be recorded; it came back in the same way; he kept the original deed till it was lost.

The deposition of Margaret Shanon was in substance as follows: "I am a sister of Ann Ryan, wife of the defendant, and also of Ellen Mitchell, deceased, wife of John Mitchell. Ellen lived in New York, before she came to Ohio; she was the last of father's family who came; he sent fifty dollars to bring her out; had no knowledge of her owning any land in Perry county previous to her death; I was with her off and on for two years before her death, she being sick; she had not enough of the necessaries of life; she had nothing that was nourishing, but did not complain, because she thought her husband was poor; she and Mitchell, after they left McConnellsville, lived on a farm owned by Mitchell and his father, until it was sold to P. Fagan; they then moved on to Caron's farm, where they lived about a year, and until she died; that farm had cleared land, but they lived in a small log-cabin in the woods; during that time Carons and they fell out, and she wanted to move on an eighty-acre tract adjoining father's farm; she told me that if Fagan would pay his notes, according to promise, they would buy a nice little place, if only 40 or 80 acres; I am acquainted with the place in dispute; during the time my sister lived in the neighborhood, Kinney lived on it; next, Joseph Perril, who occupied it at least during one crop; after him, was Patrick Haughran, who raised on it, I think, more than one crop; Ryan then had it; he rented it to \$380] Dawson, and afterward *to Dew, who now occupies it; it had on it, at the time of my sister's death, two houses and a stable, and a considerable of the land was cleared; never heard her or John Mitchell say anything about owning it; it would have afforded a more comfortable place to live in, than that where she died; Ellen knew all about the sales and the renting of the place by father; I told her all about it; she asked me how much father got of Ryan for it; told her \$200; Ellen had no property with which to purchase land before her coming to Ohio, or previous to her marriage; William, Michael, and Mary Ann, plaintiffs in this action, were the only children Ellen left."

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Hanna, for the plaintiffs.

Rich & Spencer, for the defendant.

THURMAN, C. J. The decision of this case depends upon the question whether the recorded instrument, purporting to be a deed from Owen Shannon and wife, to Ellen Shannon, was ever, in contemplation of law, delivered.

As the statute provides that copies from the records of deeds, duly certified by the recorder, and under his official seal, "shall be received in all courts and places within this state as *prima facie* evidence of the existence of such deeds," it is very clear that the record of a deed is *prima facie* evidence of its delivery; since, without delivery it can not exist as a deed. Swan's Stat. (new ed.) 310, sec. 10. To the same effect are the authorities: *Steele v. Lowry*, 4 Ohio, 74; *Foster's Lessee v. Dugan*, 8 Ohio, 87; *Hammell v. Hammell*, 19 Ohio, 18; *Jackson v. Perkins*, 2 Wend. 317; *Gilbert v. N. Am. Ins. Co.*, 23 Wend. 46.

It is also clear that this presumption may be rebutted by proof. For the statute makes the record *prima facie* evidence only, for the obvious reason that it may be the result of accident, mistake, or fraud. And being the act of a mere ministerial officer, there is no reason why it should not be subject to explanation. See the cases above cited, *and also *Chess v. Chess*, 1 Penn. 32, and *Jack- [381*
son v. Schoonmaker, 4 Johns. 163.

It was therefore proper for the defendant to introduce such rebutting testimony; indeed, it was indispensable for him to do so, as the burden of proof that a recorded deed was not delivered rests upon the party attacking it.

He accordingly called Owen Shannon, the grantor, who testified as follows:

"The grantee, Ellen Shannon, was my daughter; at time of deed to her in 1838, 2d April, she was in the east; she knew nothing of it; no consideration passed, and she never had any knowledge of the conveyance; she was born in 1823; she was 15 years old when the deed was executed; she came to Ohio in a year afterward; was married in about two years after the conveyance; at this time I was in possession, and I continued in possession until I contracted to sell the land to Kinney; he took possession, made improvements, left and gave up his contract; then Patrick Haughran went in under a verbal contract with me, and made improvements; he left;

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I then sold it to Timothy Ryan, the defendant; he paid me \$200; agreed to; that was the consideration; Ryan never moved on to the place; Ryan agreed to sell to Duffy; the legal title is in Ryan, and he is in possession by Duffy; my daughter (Ellen) lived a mile from the place after her marriage; she died in January or February, 1852; she never had any notice of the conveyance; I sent the deed by mail from McConnellsville to Somerset to be recorded; it came back the same way; I kept the deed until it was lost."

Other testimony was given by the defendant tending to prove that the grantee, Ellen, knew of the control over the property exercised by her father, and of his several contracts in relation to it; and that she made no objection, nor asserted any claim; but the same testimony strongly tended to establish that she never had any knowledge of the conveyance; nor did her husband know of it until after her death, and after the sale to Duffy. It was also 382] agreed that Owen Shannon paid the taxes upon the land until he sold to Ryan. Upon this testimony, the first question for our consideration is, with what intent did Owen Shannon send the deed to the recorder to be recorded? Did he thus deliver it for the use of the grantee, and to pass the title to her immediately, or had he some other intent?

That a delivery of a deed to a stranger for the use of the grantee may be a sufficient delivery, is well settled. 1 Shep. Touch. 57, 58; 12 Johns. 421.

But it is said in the Touchstone that if such a delivery be made without a declaration of the use, it seems it is not sufficient. The reason of this is very obvious. If the deed be delivered to the grantee, the natural presumption is that it is for his use, and no words are necessary. But if it be handed to a stranger there is no such natural presumption; and hence, unless there be something besides the mere act of delivery to evidence the intent it is impossible to say that the grantor designed to part with the title. For the delivery may be by mistake, or for mere safe-keeping, or for some other cause wholly independent of a purpose to transfer the estate.

But while it is thus apparent that the mere act of delivery to a stranger is insufficient, it is equally clear that there is no precise form of words necessary to declare the intent. Anything that shows that the delivery is for the use of the grantee is enough. For the real question is, does the grantor by his act mean to part

with his title? and whatever satisfactorily manifests this design is as good as an explicit declaration. Now it does seem to us that when a man executes and acknowledges a deed and delivers it to the recorder, with unqualified instructions to record it, as was done in the present case, the reasonable presumption, in the absence of any rebutting circumstance, is that he means thereby to transfer his title. And this presumption is powerfully strengthened when, as in the case before us, the grantee is a minor child of the grantor, and is at a great distance from him, so that the deed can not be delivered to her in person, *and when, too, the circumstances [383] tend to show that it is a gift, and a reasonable one, for aught that appears, for the grantor to make.

It is argued, however, that there are circumstances in proof that rebut the idea that Shannon, when he caused the deed to be recorded, meant to part with his title; and we are referred to his subsequent possession of the instrument, to his subsequent control of the property and contracts to sell it, and to the failure of the grantee, or her husband, to assert any claim to the land before the commencement of this suit.

As to the last circumstance, it is explained by the fact that the grantee died without any knowledge of the deed; nor did her husband know anything about it until just before this suit was commenced. No inference, therefore, can be drawn from their silence. What weight, if any, should be given to the fact that the grantor never communicated to either of them the existence of the conveyance, is another matter.

Much stress has sometimes been laid upon the fact of the grantor's possession of a deed after an alleged delivery of it; and it has been said that such subsequent possession is a very pregnant circumstance to show that the supposed delivery was not absolute. That this may often be the case is undeniable; but where the deed has been recorded, such subsequent possession is evidently entitled to much less consideration than where it has not. An unrecorded deed is the sole evidence of title, and it would be unsafe and altogether unusual to leave it with the grantor after its delivery. But a recorded deed is not the sole evidence. The statute makes the record also proof, and a copy of it is admissible, even though the party offering it has the deed itself in his possession. Hence, with us, people have been proverbially careless about their deeds after they are recorded, and often, if not generally, seem to attach

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more importance to the record than to the original. Add to this that the grantor, Owen Shannon, was the father of the grantees, 384] Ellen; that *she was a minor, and away from home several hundred miles when the deed was recorded, and that she remained away for about a year, and it seems to us that but little, if any, importance ought to be attached to his subsequent possession of the instrument. He was her natural guardian, and there was nothing strange in his having the custody of what belonged to her, even though it was a deed in which he was the grantor.

Waiving the question, whether the subsequent acts of ownership, exercised by Owen Shannon, in respect to the land, and his failure to communicate the existence of the deed to his daughter, are admissible evidence to prove that it was not his design to transfer the title to her when he caused the instrument to be recorded, we are inclined to the opinion, after a consideration of the whole case, that the testimony rather tends to prove a change of his mind subsequent to the delivery to the recorder, than to establish that it was not then his purpose to convey the estate. If it had been his purpose when he made the delivery, to retain any control over the property, it is reasonable to suppose he would have declared such purpose to some one; if not to the recorder, at least to some member of his family, or to some friend. He was aware that by causing the deed to be recorded, he would, *prima facie*, be divested of his title, and it is not very reasonable to suppose that he would make such a *prima facie* case against himself, without taking some precaution to enable him to rebut it, if he did not mean to do what his act purported. But this is not all. He was called as a witness, and testified. When he did so, he had the strongest motives to state that he did not mean, by the execution and recording of the deed, to part with his title. For he had subsequently conveyed the land to Ryan with warranty, and if he made that conveyance willfully and corruptly, knowing that he had no title, he committed no less than a penitentiary offense. Yet he uttered not one word to explain the intention with which he sent the deed to the recorder. 385] Nor did the defendant venture, so far as *appears, to put a question to him touching his intent. Why this silence of both witness and party? Why this failure to prove what the interest of both required to be proved? Why this neglect to make a successful defense? It seems to us there is but one answer we are authorized to give to these questions, and that is, that the question

was not asked, because the answer would have been unfavorable, and, for the same reason, there was no unasked statement by the witness. This is the ordinary presumption where a party fails to offer proof of what he ought to prove, if it exist. It is almost incredible that, in the case before us, the defendant would fail to ask, and the witness to state, whether it was the intention to convey the land, if that intention had not in fact existed. The very object for which the witness was called was to prove that the deed was never delivered, but instead of asking him directly for what purpose he caused it to be recorded, the defendant contents himself with proving circumstances, from which he asks the court to infer the purpose.

We suppose the truth to be, that the deed was sent to the recorder to be recorded in order to vest the title in the grantee, and make the property hers; but, that afterward, the grantor changed his mind, and concluded not to give it to her. And, it is altogether probable, assuming the deed to be a gift, that he supposed he had a right to revoke it. This view reconciles his conduct perfectly, without imputing to him any wrong motive at any time, and it is the only view that, upon the testimony, we feel at liberty to take.

And here I would remark, that very clear proof ought to be made, to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title. If such deeds could be overthrown by slight testimony, a door would be opened to the grossest fraud. The testimony should, therefore, do more than make a doubtful case. It should establish clearly, that the delivery for record was not for the use of the grantee.

*But it is urged, that even if Owen Shannon did intend to [386 part with the title, yet the delivery was insufficient, because it was never accepted, or assented to by the grantee; and it is said that every sufficient delivery includes such assent or acceptance, for no one can be made a grantee without his consent.

It is true, that judges have said, with more solemnity than I think the occasion warranted, that no one can have an estate thrust upon him against his will, and that, consequently a delivery of a deed to a stranger, for the use of the grantee, is of no effect, until assented to by the latter. How much weight this argument is entitled to, may be judged of by the fact that estates are every day thrust upon people by last will and testament; and it would certainly sound

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somewhat novel to say that the devises were of no effect until assented to by the devisees. If a father should die testate, devising an estate to his daughter, and the latter should afterward die without a knowledge of the will, it would hardly be contended that the devise became void for want of acceptance, and that the heirs of the devisee must lose the estate. Neither will it be denied that equitable estates are every day thrust upon people by deeds, or assignments, made in trust for their benefit, nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the statute of descent, and we begin to estimate the value of the argument, that a man shall not be made a property holder against his will, and that courts should be astute to shield him from such a wrong.

It is certainly true, as a general rule, that acceptance, by the grantee, is necessary to constitute a good delivery, for a man may refuse even a gift. But that such acceptance need not be manual is equally true, and it is also certain that simple assent to the conveyance, given even before its execution, is a sufficient acceptance. Thus, where a vendee had fully paid for the land and was entitled to a conveyance, and his vendor, without his knowledge, executed 387] the deed *and delivered it to a stranger, not of the vendee's appointment, for the use of the latter, it was held that the delivery was sufficient and the deed took effect immediately, although the vendee was wholly ignorant of what was done. *Church v. Gilman*, 15 Wend. 656. So, patents for the public lands are held to take effect as soon as issued, though they may never come to the grantee's hands, and were issued without any specific application for them.

But the cases go still further, and, upon the soundest reasons, hold that where a grant is plainly beneficial to the grantee, his acceptance of it is to be presumed in the absence of proof to the contrary.

It is argued, however, that this is only a rule of evidence, and that where the proofs show that the grantee has never had any knowledge of the conveyance the presumption is rebutted.

If this argument were limited to cases in which an acceptance of the grant would impose some obligation upon the grantee, I am not prepared to say that I would object to it, although the obligation might fall far short of the value of the grant. But where the grant is a pure, unqualified gift, I think the true rule is that the

presumption of acceptance can be rebutted only by proof of dissent; and it matters not that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he *did* know of and *rejected* it. If this is not so, how can a deed be made to an infant of such tender years as to be incapable of assent? Is it the law that if a father make a deed or gift to his infant child, and deliver it to the recorder to be recorded for the use of the child, and to vest the estate in it, the deed is of no effect until the child grow to years of intelligence and give its consent? May the estate, in the meantime, be taken for the subsequently contracted debts of the father, or will the statute of limitations begin to run in favor of a trespasser upon the idea that the title remains in the adult? Or, will the conveyance entirely fail, if either *grantor or grantee die [388 before the latter assent? I do not so understand the law. In such a case, the acceptance of the grantee is a presumption of law arising from the beneficial nature of the grant, and not a mere presumption of an actual acceptance. And for the same reason that the law makes the presumption, it does not allow it to be disproved by anything short of actual dissent.

I am fully aware that these views may seem opposed to many decided cases, but they are fully sustained by others that stand, in our judgment, upon a more solid foundation of reason. The strictness of the ancient doctrine, in respect to the delivery of deeds, has gradually worn away until a doctrine more consistent with reason and the habits of the present generation now prevails. *Snider v. Lachenour*, 2 Ired. Eq. 360; *Ellington v. Currie*, 5 Ired. Eq. 21; *Church v. Gilman*, 15 Wend. 656; *Tate v. Tate*, 1 Dev. & Bat. Eq. 26; *Monon v. Alexander*, 2 Ired. Law, 392.

It remains to be considered whether the deed in question was of that beneficial nature to the grantee, as to give rise to the presumption of which I have spoken.

Upon its face it purports to be for a pecuniary consideration paid to the grantor. *Prima facie*, therefore, it was neither a gift nor advancement. But the proof satisfies us that the grantor never received or expected any pecuniary consideration for it. If he intended that his daughter should have the land, he intended it as a gift. I have already said that upon the testimony we feel bound to say that he did intend to convey it to her, and we must therefore consider the deed as a gift. Applying, then, the principles we have

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recognized, the title vested in Ellen Shannon when Owen Shannon caused the deed to be recorded. She was seized of it during her intermarriage with the lessor of the plaintiff, there was an issue of the marriage, and she died before the commencement of this suit. According to the decision in *Borland's Lessee v. Marshall*, 2 Ohio St. 308, the lessor of the plaintiff became tenant by the curtesy, even if the lands were adversely held during the coverture. It follows that the plaintiff is entitled to judgment.

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*JAMES IRWIN v. WILLIAM JEFFERS ET AL.

The title of a purchaser to real estate sold by an administrator to pay debts is not divested by a subsequent reversal of the order of sale.

Notice to such purchaser, at the time of sale, that an effort would be made to reverse the order, does not affect the purchaser's title.

RESERVED in Knox county.

The proceedings in the court below were on a bill of review. The facts and questions involved sufficiently appear in the opinion of the court.

Delano & Israel, for complainant.

Curtis & Mitchell, for defendant.

KENNON, J., delivered the opinion of the court

John Jeffers, owning two lots in the town of Mt. Vernon, devised the undivided half of them (subject to a life estate therein) to William Jeffers, his son. William Jeffers afterward mortgaged his interest, or a part thereof, to James C. Irwin, to secure the payment of money loaned by Irwin. Subsequently the administrator of John Jeffers, deceased, petitioned the court of common pleas of Knox county for leave to sell a portion of these two lots (described by metes and bounds) to pay the debts of the deceased. The order of sale was made by the court, and sale made by the administrator to Irwin, the complainant; sale approved by the court, money paid by the purchasers, and deed executed and delivered to Irwin. On, or before the day of sale, William gave notice to Irwin not to bid at

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the sale, that the order of sale was erroneous, and that the heirs of John Jeffers would attempt to have the order reversed. The order of sale was afterward reversed by the Supreme Court.

The original bill in this case was filed by Irwin, to foreclose the equity of redemption of William Jeffers of his interest in that part of the premises not sold by the administrator. William's answer set out the fact of the sale of a portion of the lots to Irwin, the notice not to purchase, and *the subsequent reversal of the [390 order of sale; that Irwin had gone into possession of the premises so by him purchased from the administrator of John Jeffers, deceased, and received the rents and profits of the same, to an amount more than sufficient to pay the debt by him owing to Irwin. William claimed that by a reversal of the order of sale, Irwin's title to that portion of the lots purchased from the administrator failed, and inasmuch as he, William, had by an agreement with his mother, who had a life estate therein, obtained the right of possession from her, Irwin was bound in law to account to William for the rents and profits received by Irwin while in possession under his purchase from the administrator. And of this opinion was the district court, which decreed that Irwin should so account. This decree of the court finds, that by the reversal of the order of sale, Irwin's title failed. The present bill of review is filed for the purpose of reversing this decree. The only question, therefore, which this court finds it necessary to decide, is whether the reversal of an order of sale, made by the proper court after the sale is made, money paid, and deed duly executed, divests the purchaser of his *title* to the land.

If such sale had been made to a stranger to the record, on a judgment or decree, and such judgment or decree had been subsequently reversed, the purchaser would not be divested of his title; his right to the property would be saved by an express statutory provision. See Swan's Stat. 680. This sale, however, was not made by execution on a *judgment* or *decree*, as these terms are generally understood, but the sale was made by an express order and adjudication of the court, and the case is clearly within the spirit and reason of the statute. There is as much reason to protect the purchaser upon a sale made by an administrator, as a purchaser under a sheriff's sale, upon a judgment or decree. Public policy would seem to require that the title of the purchaser of real estate, made by the express directions of a court of competent jurisdiction, should be held

391] *valid, even if the order should be subsequently reversed. Property would sell higher, there would be more competition among bidders, where it was known that the title would not be defeated by an error of the court, than where years after the purchase the order was, upon questions of law, liable to be reversed, and thereby the title to the land lost.

If the bidders were liable to lose title by the reversal, it would be a great clog upon sales. The reversal may take place long after the purchaser has paid his money to the administrator, the administrator paid it out to creditors, and the estate settled. Under such circumstances, the purchaser might well doubt whether he would not only lose his land, but his money also, and might well make the inquiry, to whom shall I look for the money paid by me for the land? Indeed, these sales are as much within the policy of our statute as those expressly provided for by its terms. But if we had no statute upon the subject, the common law would protect purchasers.

There is a case found in 3 Coke, 181, which he thus reports: "Between Clement Hoe, executor of John Hoe, plaintiff, and Bolton, defendant. The case was such: John Hoe, the testator, had judgment to recover in the king's bench, against Bolton, £75 3s. 4d. John Hoe assigned by deed enrolled to the queen, in satisfaction of a debt due to the queen by him, as collector of fifteenths, with proviso that if the lord treasurer and barons of the exchequer, or any two of them, because the debt could not be levied in convenient time, or for any other reasonable cause, disallowed of the said assignment and revoked it, by writing under their hands, then the assignment should be void. And afterward Bolton brought a writ of error according to the new statute, and then judgment was affirmed. And afterward (on process, which is called a writ of prerogative out of the exchequer, on said assignment), the lands of Bolton were extended, and the goods, which were of a value above the said debt so assigned, were seized by the sheriff, by force of said writ, but the writ was not returned. And afterward **392]** *Periam, Ewens, and Southerton, three of the barons, revoked the assignment after the testator's death, because the testator had satisfied the debt which was due to the queen by him as collector. And now the plaintiff, as executor of John Hoe, sued a scire facias to have execution of the £75 3s. 4d.; and the said matter being disclosed by special pleading, a demurrer in law was

joined. And in this case three points were resolved. 1. That the execution for the queen was good without question, although the writ was not returned; 2. It was resolved that after execution had by the queen, the revocation came too late, for then the queen had the effect and end of the assignment, and that which was executory when assigned is now executed by lawful process of law, and therefore can not be revoked; 3. And if one has a power of revocation, if he suffers anything to be lawfully executed by force of it, as to that, he can not make any revocation." From this case, Coke argues and says: that if a sheriff by force of a *fleri facias* sell goods, and afterward the judgment is reversed by writ of error, the defendant shall not have restitution of his goods, but the value of them for which they were sold; and the reason assigned by him is this: that if the sale by the sheriff by force of a *fleri facias* should be avoided by subsequent reversal of the judgment, there would be no buyer, and by consequence, no execution done. In a note to this case, it is said, that if the sheriff sell a term under a writ of *fleri facias*, which is afterward set aside and the produce of the sale directed to be returned to the termor, the termor can not maintain ejectment to recover his term against the vendee under the sheriff; and various authorities are cited in support of this position.

A distinction, however, is made between the sale on a *fleri facias* to a stranger, and where the term is extended on an *elegit*. In the latter case, if the judgment be reversed, the term shall be restored, and the reason is that because in the case of an *elegit*, the delivery is made to the *plaintiff himself*; it is in law a bare delivery in specie, and ought to be returned in specie again, and doth not alien the property absolutely, *but attends on the execution to [393 be good or bad, as that is; but if there had been a sale by the sheriff to a stranger, it would have been otherwise.

In Manning's case, 4 Coke, 335, the question arose as to the title to a term sold on execution, and the judgment reversed afterward, in which Coke says it was resolved that the sale by the sheriff by force of the *fleri facias* should stand, although the judgment was afterward reversed, and the plaintiff in the writ of error restored to the value; for the sheriff who made the sale had lawful authority to sell, and by the sale the vendee had absolute property in the term during the life of Alice, the wife, and although the judgment which was the warrant of the *fleri facias* be afterward reversed, yet

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the sale, which was a collateral act, done by the sheriff by force of the *feri facias*, shall not be avoided, for the judgment was that the plaintiff should secure his debt, and the *feri facias* is to levy it of the defendant's goods and chattels, by force of which the sheriff sold the term which the defendant had in right of his wife, as he well might, and the vendee paid the value of it. And if the sale could be avoided, the vendee would lose his *term* and his *money too*, and thereupon great inconvenience would follow; that none would buy of the sheriff goods and chattels in such case, and execution of the judgment (which is the life of the law) would not be done. And according to that resolution, judgment was given in the common pleas, and in the King's Bench, upon writ of error. The case was after argued at the bar before Sir Christopher Wray, and the court there; and at length the judgment was affirmed, and so the point was acquiesced in by both courts; and Coke adds: "And by these judgments you will better understand the law in the books."

Now, although the decisions cited, and the reasons of Coke, apply to personal property or terms for years, still they should, in this country, apply with the same force to real as personal property. They are both the subject of sale on execution, and subject to be sold for the payment of the debts of a deceased person. It is [394] claimed, however, that the purchaser *had notice that there was error in the order of sale, and therefore, he can not be regarded as an innocent purchaser without notice. We think the mere fact that the purchaser was notified not to purchase on account of the error in the order of sale makes no difference. The order is binding until reversed, and the *authority* to sell as valid as if no error had intervened. If notice of a real or supposed error in the proceedings would affect the purchaser's title, the *implied* notice of the order or judgment upon which the sale took place would be as effectual as actual notice, and every purchaser might be presumed to have knowledge of the record of the order or judgment, and of the errors therein, and in all cases would have to purchase at his peril.

Upon the whole, therefore, we think that the order of sale made by the court is a judgment within the meaning of the statute, and the title protected thereby, and that if no such statute existed, the purchaser, by the principles of the common law, would take a good title, a title which could not and ought not to be affected by the reversal of the order of sale.

The decree is reversed.

LESSEE OF ELIJAH PRICKETT ET AL. v. AMOS PARKER.

The "ancestor" meant by "an act regulating descents and the distribution of personal estates" (Swan, old ed., note *a*, 286), was any one from whom the estate was inheritable.

The "ancestor from whom the estate came," was he from whom it was immediately inherited.

E. P. purchased certain lands, and died intestate, leaving I. P. and J. P., his sons and heirs; and R., his widow, married again. Before the birth or conception of issue of the second marriage, I. P. died, intestate and without issue, being an infant. J. P. afterward died, intestate and without issue. At the time of *his* death, there was issue of the second marriage. *Held*, that, within the meaning of the said act, I. P. was the ancestor of J. P., from whom a moiety of the lands came to the latter; and that on the death of J. P. his half-brothers took that moiety, under the last part of the fourth clause in section one of the act cited.

EJECTMENT; reserved in the district court of Logan county.

*The case is stated in the opinion of the court.

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Rogers & White, for plaintiffs.

Stanton & Allison, for defendants.

WARDEN, J. Eli Parker, the purchaser of the lands in question, died in 1823, intestate, leaving Isaac and Joseph, his sons and heirs. His widow, Rebecca, was married about a year afterward to James Prickett. Of this second marriage of Rebecca, the plaintiff's lessors were the issue. Before their birth or conception, however, Isaac Parker died intestate, and without issue, himself an infant. In 1833, Joseph Parker died, also intestate, and without issue. Amos Parker, the tenant in possession, is a brother of Eli Parker, the purchaser, and holds all the interests of all the brothers of Eli in the lands. He has all the lands in possession.

The half-brothers of Joseph claim the moiety of the lands which he, Joseph, inherited from his brother Isaac.

The statute of 1831, "regulating descents, and the distribution of personal estates" (Swan, old ed., note *a*, 286), was in force when Joseph died. That act provides the following course of descents, for a case like that before us: That when any person shall die intestate, having title or right to any real estate of inheritance in this

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state, which title shall have come to such intestate by descent, devise, or deed of gift from any ancestor, such estate shall descend or pass in parcenary to his or her kindred in the following course: first, to the children of such intestate, or their legal representatives; second, if there be no children or their legal representatives, the estate shall pass to the brothers and sisters of the intestate who may be of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or the half-blood of the intestate; third, if there be no brothers or sisters of the blood of the ancestor from whom the estate came, or their legal representatives, and if the estate came by deed of gift from an ancestor who may be living, the estate shall ascend to such 396] ancestor; fourth, if the *ancestor from whom the estate came, be deceased, the estate shall pass to the brothers and sisters of such ancestor, or their legal representatives; and for want of such brothers or sisters, or their legal representatives, to the brothers and sisters of the intestate of the half-blood, or their legal representatives, though such brothers and sisters be not of the blood of the ancestor from whom the estate came; fifth, if there be no brothers or sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came."

That the word ancestor, as used in this act, is not to be understood as when used in common parlance, is well settled in Ohio. That an uncle of the intestate, from whom the latter inherited, was his ancestor in the sense of a statute like that before us, in this respect, being the amendatory act of 1835, was held in *Brewster v. Benedict*, 14 Ohio, 385. That a father, who took the estate by deed of gift from his father, was the legal ancestor of his son and heir, not the grandfather from whom the estate came *through* the father, was held in *Curren v. Taylor*, 19 Ohio, 36.

It thus appears that the ancestor meant by our statute, is any one from whom the estate is inheritable, and that the ancestor from whom it must, in law, be understood to "have come to the intestate," is he from whom it was immediately inherited.

The policy of the Ohio law in making such an ancestor take the place of the first purchaser of the estate, though a wide departure from the English canons of descent, is neither singular nor exceptionable. If it is not so now, it was at one time the policy of several other states; and it is quite reasonable. On this subject the

language of Story, J., in *Gardner v. Collins*, 2 Pet. U. S. 91, deserves notice.

"It is true, that in a sense, an estate may be said to come by descent, from a remote ancestor, to a person upon whom it has devolved through many intermediate descents. But this, if not loose language, is not that sense which is ordinarily annexed to the term. When an estate is said to have *descended from A to B, the [397 natural and obvious meaning of the words is, that it is an immediate descent from A to B."

That the effect of such a construction is to prefer brothers of the half-blood of the intestate to his uncles and aunts, does not strike us as repugnant to any natural sentiment, or opposed to any principle founded in good policy. In some of our sister states, such a preference has been made by statutes directed especially to that end. In our own state, where the estate came by purchase, the husband or wife of the intestate, as well as the brothers and sisters of the half-blood, now stand before the uncles and aunts. The policy as to ancestral estates is still somewhat different. But enough appears to show that no *remote* ancestor has any favorable estimation in the eyes of our law.

It is said, by counsel for defendant, to be "an utter perversion of language to call a child five or six years old the 'ancestor' of an elder brother." We can not see any greater abuse of language in calling a younger brother an ancestor, than in allowing an elder brother or an uncle to be such ancestor. If we were to regard the strict derivation of the word, the objection by counsel to the construction given by our courts to this term might seem well taken; but neither the primary definition nor the legal sense of the word ancestor, agrees with its most popular and most obvious signification. It would never occur to one unversed in the law, and equally unlearned in philology, that an uncle could be called the ancestor of his nephew, or an elder brother pronounced the ancestor of a younger, merely because he *went before* him in the order of birth. But the Supreme Court of this state, in the case first cited, well apprehended the meaning of our law when it uses the word in question. And we are equally well satisfied that he from whom the estate was *immediately* inherited is the ancestor, the *propisitus*, from whom, according to our law, the estate came. This ancestor, as to the moiety claimed in this case, was Isaac Parker.

*It is, however, supposed by the same counsel, that the case [398

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of *Brewster v. Benedict*, although as we have seen it establishes a definition of the word ancestor, from which the conclusion we have announced inevitably follows, is really against the opinion here expressed. And it must be admitted, that the *judgment* in that case might have been other than it was had the counsel for the complainants there assumed the position taken by plaintiff's counsel here. The lands there in controversy had been devised by David M. Benedict so as to come to two infant nephews, who would have inherited it without the devise. Both these infants died in their infancy without issue. After the death of their mother the father married a second wife, by whom he had issue. If there was even an hour's difference in the time of the death of the nephews of Benedict, one of them was, according to the construction we have here given to the statute, the *ancestor* of the survivor, from whom a moiety of the lands came to the latter. Neither court nor counsel notice this difference in the time of death, if there was any; nor does the statement of the case, which I suppose was made by Judge Hitchcock, inform us of the facts in this particular. We can not doubt, however, that there was an interval between the deaths. Had the counsel in that case, therefore, assumed the position here taken, the judgment of the court might have been different. Whether the construction of the *will* would have varied, we do not undertake here to determine. It is enough to say, however, that, without speculation upon the probable reasons of such an omission, the ground was not taken, and the attention of the court was not called to any such question. For our purposes, the decision is easily understood, and the proposition on which the court founds its opinion is not affected by the oversight in its application. From it necessarily followed the ruling in 19 Ohio, that the ancestor from whom the estate came, was he from whom it was immediately inherited. The judge who laid it down remained on the bench, and as chief 399] justice agreed to the deduction from it made by Avery, *J., in 19 Ohio. We are too well satisfied of the justice and humanity of the preference given by our laws to the brothers and sisters, whether of the whole or half-blood, of him from whom lands are immediately inherited, over the like relations of a remote ancestor, to disturb the rules established by the cases cited.

Without, therefore, examining whether, within the meaning of our statute, the words "of the blood" have their common-law signification or not, and thus passing the question whether the plaintiff

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iff's lessors were "of the blood" of Isaac Parker, we say, that they are entitled, as half-brothers of Joseph Parker, and under the latter part of the fourth clause of the section cited, to that moiety of the lands in the possession of the defendant, which Joseph Parker inherited from Isaac.

Judgment for plaintiff.

SAYRES GAZLEY ET AL. v. C. W. HUBER, THE TOWN OF WILLIAMSBURG, ET AL.

On a bill of review, a mere difference of opinion as to the weight of evidence, between the court which pronounced and that which reviews a decree founded on that evidence, will not warrant the reversal of the decree. *Tracey v. Sackett*, 1 Ohio St. 54, followed and approved.

On all the questions of law and fact involved in the case of *Huber v. Gazley* and others, 18 Ohio, 18, the opinion of the late Supreme Court in bank is approved.

BILL of review. Reserved in the district court of Clermont county.

The case is stated in the opinion of the court.

Pugh & Pendleton, and Howard & Lewis, for plaintiffs.

Lowe, and Fishback & Swing, for defendants.

WARDEN, J. The object of this bill is to reverse a decree of the late Supreme Court in bank, certified to the Supreme Court in Clermont county, and there entered.

*In that proceeding, Huber and the town of Williamsburg [400] were complainants, and Gazley had been enjoined from tearing what were claimed to be public buildings, and from selling or disposing of what was claimed to be the public square, in the occupancy of Gazley, and which the latter pretended had reverted to General Lytle on removing the county-seat from Williamsburg.

The court found that the ground "did not revert to the said William Lytle on the removal of the county-seat from Williamsburg, but that the people of said town are fully entitled, and have good right, to the use and benefit of said public square and the

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buildings thereon, except as hereinafter excepted, and are entitled to have the same secured for their benefit." It was therefore ordered, adjudged, and decreed "that the injunction allowed herein be and the same is hereby made perpetual, and that the people of the said town of Williamsburg do have the use and benefit of said public square and buildings thereon, except such buildings, if any, as have been erected by the said Gazley, free from all claims to and rights in the same by the said defendants forever."

The reasons on which the Supreme Court founded this decree appear in the opinion of Spalding, J., reported in 18 Ohio, 22. They were substantially as follows: The court was satisfied that when the town was laid out, Lytle made a plat, numbering all the lots, fairly displaying the streets and alleys, and having the words "public square" written upon the space representing the ground in controversy; that this plat, having been made in '96 or '97, was not by law required to be then recorded; and, in the language of Judge Spalding, "it is lost sight of, in the evidence, for many years;" that a second and formal dedication, made by General Lytle when the removal of the county-seat was threatened, while it could not be allowed to control the use of the town under the original dedication, furnished evidence that there had been such original plat as that referred to, and that it had been recorded in due season. The 401] court says: "It is *fair to presume, then, that after the act of 1800 took effect, and within the time that would save him from the penalty, General Lytle placed in the recorder's office of Clermont county the original plat of his town, or a copy thereof, for record. This plat was sewed into the record-book, in conformity with a practice which obtained in many parts of the state, in its first settlement, and has thus been preserved to this day." And again: "Here we find the important admission, made by General Lytle, that the plat of this town had been before recorded in due season, agreeable to law. If in due season and agreeable to law, it must have been done after the act of 1800 took effect, and within twelve months thereafter, to wit, anterior to the month of May, 1802. It is not pretended that the records of Clermont county show any plat of Williamsburg anterior to the plat of 1815, save only the plat stitched in book C, and first seen in the years 1813 and 1814 by General Richard Collins."

The court also notices the reference to this plat in "many ancient deeds;" its general recognition in 1814 as the true plat of the

town; the user by the inhabitants of Williamsburg, and the perfect compatibility of their possession and claim with those of the county. And the improbability of any original intention on the part of Lytle to dedicate for *county* purposes, is thus stated by the court: "At the time when this land was thus dedicated to the public use, Clermont county had no existence, and therefore the claim that Gen. Lytle originally designed it as a site for county edifices, so long as Williamsburg should remain the county-seat, has no foundation in fact." The fact that, as early as 1799, the ground in controversy was called the public square, is also considered by the court as significant of what was understood to be the object of Lytle's dedication.

Finding a right in the then complainants to a decree establishing the dedication, and preserving the public use, the court thus disposes of the claim made under the occupying claimant law: "The defendants are not warranted by the facts in setting up a want of notice, and we know of no rule *which will justify us in [402 charging upon the public square the consideration money which they paid, or the expense which they have incurred in making improvements thereon."

Against the conclusions of fact, formed by the court in disposing of the leading questions in the case, counsel for the plaintiffs in this bill of review have urged many arguments and suggestions which are worthy of attention, and have received it.

It is said that "the material facts upon which the court proceeded are without foundation in the evidence." We can not notice in this opinion all that counsel have said to show what is here asserted. The chief points, however, are the following:

The user by the inhabitants of Williamsburg is said to have been slight in itself, and only such as was *permitted* by the sheriff and other authorities of the county. The answer of Gen. Lytle to a bill filed against him by the commissioners of Clermont county, who claimed rights in the land, is said to have been overlooked or disregarded by the judge who delivered the opinion of the Supreme Court in bank. It is objected that although "the most authentic history, as well as the most connected," of the facts to be considered in the question of dedication, is to be found in that answer, "Judge Spalding makes not the slightest allusion to this important source of evidence." The fact that the plat held by the court to be the original evidence of dedication, was never copied

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into the records, being merely stitched into a book to which it did not belong in the order of recording, together with the evidence of Gen. Lytle respecting it in the sworn answer referred to, is said to explain the statement of Lytle, in a note appended to a second plat made in 1815, that "the plat of the town had been before recorded, in due season, agreeable to law," so as to show that the particular paper found in the records was not that made by Lytle himself. A different construction from that adopted by the court of the recitals and references in Lytle's deeds is plausibly presented 403] as the true one. On the subject of what Lytle *could* have intended in laying out the town, it is said that the objection of the court is purely technical—that "the country east of the Little Miami river was not within the boundaries of Hamilton county, as at first defined. It was annexed afterward, for temporary convenience, and until it could acquire a population sufficient to authorize a new county between the counties of Hamilton and Adams. In view of this fact, and of the increase of settlements in that region, Gen. Lytle selected the site of Williamsburg as that of a county-seat soon to be established." That the declaration of Lytle, in 1815, was made for the benefit and at the instance of the people of Williamsburg, who then recognized the right of the county, is also urged. The town of Williamsburg is said to be claiming in *privity* to the county commissioners, and the abandonment of the latter of their claim, is much relied on in the argument. The testimony taken to show the understanding and behavior of all parties, Lytle, the county authorities, and the people of Williamsburg, is drawn into a light different from that in which the court thought it ought to be regarded.

It is not surprising that through the ability and ingenuity of counsel, it appears that transactions, most of which occurred fully and all of them nearly half a century ago, are not proven in this case, so as to be beyond doubt as to the order of their occurrence, their importance or insignificance, their certainty or uncertainty.

But this is not enough.

The rule recognized in *Tracey v. Sackett*, 1 Ohio St. 54, that, upon a bill of review, a mere difference of opinion on the weight of evidence, between the court which pronounced, and that which reviews a decree founded on that evidence, will not warrant the reversal of the decree, is too reasonable in itself, and too well established, to be now brought in question. It is not intended by the law on this subject, to allow two trials of the same cause, as a mere matter of

common right, and of course ; at least as much respect should be given to the finding of a court, as to that of a *jury, and a [404 very clear case of error, in estimating the facts, ought to be shown before the solemn decree of a competent tribunal should be set aside.

On looking into the facts in the case before us, we find no such case made out. That the question whether the plat found out of its order, not written into the book, but merely stitched between its fly-leaves, was the original plan or diagram made by General Lytle, or some unauthorized substitute therefor, is not free from all doubt, may be admitted. Nor is it to be denied, that a difference of opinion may fairly arise, when we come to inquire whether Lytle intended to dictate for any other than a county use. The answer of General Lytle to the bill of the commissioners, if it could be regarded in this case at all, might militate against the supposition that he was aware of any dedication for town purposes. But it can not avail his grantees against the original complainants, who had no representative in the case referred to ; and if it could, we might differ as to the effect of its statements of fact. To some, it might seem that General Lytle meant to ignore the first plat ; to others, it might appear that no question of a *town* right being involved in the case in which he was required to answer, he did not find it necessary to place the particulars of the dedication, in this respect, before the court. And it may be that counsel are right in the view they take of this part of the case, when they say they "have no doubt that the original town-plat was delivered for record by General Lytle, in obedience to the act of December 6, 1800, and that the recorder neglected to copy it into the appropriate book, or even to preserve it with proper care." The paper found stitched into the book of records, may have been a "mere draft made by the recorder or some of his deputies for convenient reference." When it is admitted, however, that the facts in this case might have been estimated in accordance with these arguments and suppositions of counsel, it is only admitted, that the case was one of doubt and difficulty. After a careful *examination, we find no reason to set aside [405 the finding of the court, that the weight of evidence established the identity of the paper as the original plat of dedication, and that the user of these lands, and the conduct of all parties, have been such as to secure and preserve to the people of Williamsburg whatever rights Lytle intended to confer.

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Thus, respecting the conclusion of the court on the facts, the law applied to them appears to have been correctly laid down on all the questions relating to the dedication.

When we come to the refusal of such relief as is allowed at law to occupying claimants, there may be more difficulty in agreeing to the conclusion of the court. For one, I am not satisfied that Gazley did not purchase in good faith. I can not think there was such notice to him of the dedication and the use under it, as to withdraw his claim, had this been an ejectionment, from the benefit of the statute on this subject. But when we remember that the origin of the provisions of our statute for the benefit of occupying claimants was in purely equitable principles, and that those provisions were made in order that the successful claimant should not have the *benefit* of improvements without paying for them, we must allow that the court was warranted to deny compensation for erections on this public land, which could not be of public benefit. The case may be a hard one for the plaintiffs in this bill of review, but their equity was not such as to charge the town of Williamsburg with what (while it may have been valuable to them) was certainly useless, if not hurtful, to the inhabitants of the town.

On all the questions decided in 18 Ohio we hold that the decree of the court is free from error.

Bill dismissed.

406] *DAVID CROWELL v. THE PRESIDENT, DIRECTORS, AND COMPANY OF THE WESTERN RESERVE BANK.

An objection to a question and answer in the deposition of a witness, on the ground that the question is *leading* in form, is an objection, not to the substance or relevancy of the testimony of the witness, but to the form and manner of obtaining it, and should be made at the time the question was propounded, but if not made then, or within proper time before the cause is called for trial, it will fairly and reasonably be taken to have been waived.

The exceptions to the general rule, that a witness must depose only to facts within his knowledge, leaving the inference or understanding from the fact, to be gathered by the jury, relate to questions of science, skill, trade, identity of persons, etc., as to which witnesses have been allowed to express their opinion or belief.

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The rule that a witness may state his *impression*, results from the fact that a witness can not be required to depose positively, when his recollection is not distinct and certain. But the impression of a witness, to be admissible as evidence, must be, not the result of a process of reason and judgment, but simply *facts impressed* on his memory, and of which his recollection is not sufficiently distinct to arise to *positive* assurance.

The testimony of a witness consisting of the narration of the conversation of a party, is always to be received with great caution. And to allow a witness, after the narration of a conversation, to state his *conclusions* or *understanding* from the conversation, as to the *meaning* or *understanding* of the parties to the conversation, would be a most dangerous relaxation of the rules of evidence.

It is competent to give in evidence, with a view to prove the existence of a partnership and the firm name, besides the verbal admissions, or ordinary business transactions and conduct of a party, testimony showing the acts of the party under the solemnity of his deed in the firm name, and relating to the partnership business foreign to the particular transaction or contract which constitute the foundation of the action.

On an issue before a jury on a separate plea of a surety, and also to assess the damages against other parties allowing judgment by default without plea, in a suit on a promissory note, the principal on the note allowing default for want of plea, is not a competent witness for the party pleading to the action, no separate judgment having been rendered against him.

PETITION in error to reverse the judgment of the court of common pleas in Ashtabula county.

The original action was assumpsit, instituted by the defendants in error against Calvin P. Knowlton, Hiram M. Knowlton, Stephen *O. Knowlton, Peter Vandecker, and David Crowell, on a [407 promissory note given by them to said bank for two thousand dollars, dated Warren, Ohio, July 4, 1851, by which the makers stipulated as follows: "Ninety days after date, we, the subscribers, C. P. Knowlton as principal, and the others as sureties, jointly and severally promise to pay to the president, directors, and company of the Western Reserve Bank two thousand dollars, at the banking-house, for value received." The full name of each of the defendants in the action was subscribed to the note, except that of the two last, for whom the note was signed in the name and style of Vandecker & Crowell. The defendant, David Crowell, filed a plea of non-assumpsit, verified by affidavit. The other defendants were defaulted for want of plea. And, at the October term of said court of common pleas, 1853, a jury was impaneled and sworn to try the issue on the plea of David Crowell, and also to assess the

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plaintiff's damages against the defendants who had suffered judgment to be taken by default. On the trial before the jury, the plaintiff, to maintain the issue on its part, gave in evidence the note declared on above described; also, gave evidence tending to prove that David Crowell and Peter Vandecker were, at the time of the execution of the note, partners doing business in the name and style of Vandecker & Crowell; that the name of the firm had been signed to the note by Vandecker, with the consent and authority of Crowell. The plaintiff also gave in evidence a deposition of Truman W. Mead, to a question and answer in which the defendant Crowell objected, but the objection was overruled by the court, and the entire deposition allowed to be read to the jury as evidence, to which ruling of the court the defendant excepted. And, further to maintain the issue on the part of the plaintiff, a mortgage deed, by Vandecker & Crowell, to sundry persons on certain real estate, to indemnify said persons for becoming sureties for Vandecker & Crowell on two several notes, one payable to the Bank of Geauga, and the other to a bank at Ashtabula, and which mortgage **408]** gage *was executed and acknowledged by Crowell, in the firm name of Vandecker & Crowell, was offered in evidence, to the introduction of which the defendant, Crowell, objected; but the court overruled the objection, and allowed the paper to go to the jury. To this ruling defendant Crowell also excepted. The plaintiff having offered further evidence, and rested, the defendant, Crowell, to maintain the issue on his part, called Calvin P. Knowlton, one of the defendants, who had been defaulted, and the principal in the instrument declared on, and proposed to examine him as a witness, to which the plaintiff objected, which objection was sustained by the court, and the defendant Crowell excepted likewise to this ruling. After a verdict rendered for the plaintiff, the defendant Crowell moved for a new trial, assigning as the grounds thereof, among other things, that the court had erred in admitting incompetent evidence before the jury, and also in refusing to admit Calvin P. Knowlton to testify as a witness on the part of defendant. The court, however, overruled the motion for a new trial, and rendered judgment for the plaintiff. And the defendant, Crowell, took his bill of exceptions to the various rulings of the court, and filed this petition in error to reverse this judgment against him in the court of common pleas.

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John Crowell, for plaintiff in error.

J. D. Webb & M. Birchard, for defendant in error.

BARTLEY, J. The determination of this case involves an inquiry touching the correctness of the ruling of the court of common pleas in regard, first, to the *competency of evidence* admitted against the objections of the plaintiff in error; and, second, in regard to the *competency of a witness* not allowed to testify on behalf of the plaintiff in error, on the trial of the cause before a jury.

I. It is claimed, on behalf of the plaintiff in error, that the common pleas erred in overruling the objection to the fifth question and answer to the deposition of Truman W. Mead, read to the jury on the trial below, on the part of the defendant *in [409 error. This part of the deposition is contained in the following words, to wit:

"State whether it was then, in this conversation, understood between Vandecker and Crowell that they would sign the note with Knowlton; or state what you understood from them as to that?"

"Answer—I *understood* from the conversation between them, that it was *understood* between themselves to sign the note with Knowlton."

No objection to this question and answer appears to have been noted on the deposition, or previous notice thereof given to the defendant in error, but the objection was made at the time the deposition was offered on trial. And the only ground of objection urged in the argument, submitted by the counsel for the plaintiff in error, is, that the question was leading in its form. If this was the only objection existing to this part of the deposition, the question of the competency of the evidence would require but little consideration. For, waiving the inquiry whether the question was, in form, leading, suggesting to the witness the answer which the interrogator sought to elicit, it is sufficient to say that the objection was not noted on the deposition, or notice thereof given to the opposite party before the commencement of the trial. Exceptions to depositions for other causes than the competency of the witness, or the relevancy of the testimony, should not be heard unless noted on the depositions, or notice thereof given to the opposite party, before the cause is called for trial. Objections to parts of depositions, merely formal in their nature, will be taken

to have been *waived*, if not made, or notice thereof given to the other party until after the trial has commenced. To prevent parties from being taken by surprise during the progress of a trial, and for the furtherance of justice, this is required by the general principles of practice in the absence of any adopted rule of court to that effect. Such was the practice which was recognized as correct in the case of *Ash v. Barlow*, 20 Ohio, 127, and fully laid down by the court in the case of *Cowen v. Ladd*, 2 Ohio St. 224. The objection that a question is leading in its form, is an objection 410] not to the *substance or relevancy of the evidence, but to the form and manner of obtaining it, and should be made at the time the question is propounded; but if not made then, or within proper time before the cause is called for trial, it will be fairly and reasonably taken to have been waived.

But there is a more serious objection to this evidence which we do not feel at liberty to pass over, and which goes not to the mere form of the examination of the witness, but to the substance or competency of the testimony itself. The interrogatory calls, not for the conversations or admissions of the parties, but the *understanding* of the parties inferable from their conversation, or the *understanding* of the witness derived therefrom. And the answer is strictly responsive to the question, and gives the *understanding* or *inference* of the witness touching the understanding or conclusion of the parties from the conversation. The true effect of this part of the deposition will be more clearly apparent from its connection with what precedes and follows it, as will be seen from the following extract from the deposition:

"4th Question—While you were in their employ, what, if anything, did you hear said by either Vandecker or Crowell about their signing a note with the other defendants in this suit to the Western Reserve Bank? Please begin at the commencement of said conversation and state all you heard, and where it occurred, and who was present.

"Answer—I was in their store. Knowlton and Crowell were present. Knowlton wanted Crowell to sign a note to the Western Reserve Bank. Crowell rather objected. He (Crowell) did not want to sign the note unless he could be secured. He said he would see Vandecker about it. He left the room. Soon Crowell and Vandecker came down into the store-room together. Crowell remarked that he was satisfied that Knowlton had money enough coming from the west to secure him; the money was coming through

Vandecker's hands. They could retain it and apply it. Crowell remarked, that we will or would help the poor devil out of the scrape.

"5th Question—State whether it was then in this conversation *understood* between Vandecker and Crowell, that they would sign the note with Knowlton; or state what you *understood* from them as to that?

"Answer—I *understood* from the conversation between them, that it was *understood* between themselves to sign the note with Knowlton.

"6th Question—What did you, at the time Crowell made the remark, 'we will help the poor devil out of the scrape,' *understand* Crowell to mean by this remark?

"Answer—My *understanding* was, that they would help [411 him to the money by signing the note."

The following appears in the cross-examination of the witness:

"Did you get the understanding that Crowell and Vandecker agreed to sign the note from anything said, except the conversation stated in your reply to the fourth question?"

"Answer—I did not."

It appears that the plaintiff below was not content with the statements of the defendants tending to maintain the action; but after the witness had related the conversation of the parties, he was further interrogated, and required to state his *understanding* or *inference* from the conversation, as to the *understanding* or *meaning* of the parties.

The general rule is, that a witness must depose to the *facts* within his knowledge, leaving the inference or understanding from the facts to be drawn by the jury. It is true, there are some exceptions to this rule. On questions of science, skill, trade, identity of a person, etc., witnesses have been allowed, besides testifying to the facts, to express their opinion or belief. And perhaps where the evidence consists of a close and long-continued observation of conduct, not capable of specification, so as to leave it like ordinary facts as a matter of inference to the jury, the opinion of a witness may be proper. *McKee v. Nelson*, 4 Cowen, 355. But to allow a witness, after having narrated a conversation of one of the parties, to be interrogated (and that, too, by the party calling him, notwithstanding the objection from the other side), and to state his conclusion or understanding from the conversation as to the meaning or

understanding of the parties holding the conversation, would be a most dangerous relaxation of the rules of evidence, unwarranted by any reported decision which has fallen under our observation.

A witness in his examination may be allowed sometimes to state his *impression*. This results from the fact that a witness can not be 412] required to depose positively, when his *recollection of the matter stated is not distinct and certain. But the *impression* of a witness, to be admissible, must not be the result of a process of reason and judgment, but simply a fact impressed upon his memory, and of which his recollection is not sufficiently distinct to arise to positive assurance. And this is a kind of evidence to be received with great caution, and to be strictly guarded from the liability to error. It is not sufficient that the witness has an impression on his mind so faint as to be able to tell *certainly* what made it, or how it come there. Judicial investigation would inevitably fall into error, if guided by the dim impress of a mere image on the mind of a witness with an exhausted recollection of the fact.

No class of testimony, perhaps, is more unreliable, and a more frequent cause of error in courts of justice, than the narration of conversations, real or pretended. The meaning and intention of a person in a conversation, often depend much upon gesture, attitude, mode of expression, or peculiar attending circumstances, known, perhaps, to but few present. A conversation may not be fully heard by the witness, imperfectly recollected, or inaccurately repeated, when the omission or addition of a single word, or the substitution of the language of the witness, under color of bias or excitement, for the words actually used, might change the sense of an entire conversation. This is apparent from the irreconcilable contradictions daily manifested in the narration of the same conversations from the mouths of different witnesses. The liability to error, in this kind of testimony, would be greatly increased by allowing witnesses to add their own *conclusions*, or *understanding*, from the conversation related, or their *inferences* as to the *understanding* of the parties to the conversation. Such latitude would break down an important barrier, which protects judicial investigation from error and falsehood. The understanding or inferences of witnesses are very frequently formed from bias, inclination, or interest. And a witness' understanding or inference from a conversation or 413] transaction, rests *entirely in his own mind, and his consciousness of falsehood would be incapable of proof; so that there

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could be no possibility of convicting a witness of perjury on the ground of such evidence.

It was held by the Supreme Court of Maine, in the case of *Whitmore v. Freese*, 23 Maine, 185, that where a witness, in testifying to an admission, has stated the words used, it is not competent for the party calling him to ask the witness what he *supposed* was intended by those words.

In the case of *Carmalt v. Post*, 8 Watts, 406, the Supreme Court of Pennsylvania held, that although in questions of identity and personal skill, a witness may be permitted to testify to his *belief*, not founded in knowledge, yet that the rule is otherwise in respect to facts which may be supposed to be within the compass of memory. The same doctrine was recognized in New York, in the case of *Murray v. Bethune*, 4 Cowen, 191.

In the case of *Burt v. Gwinn*, 4 Harris & Johns. 507, the court of appeals, in Maryland, held, where a part of the testimony of a witness was, "that the sum of \$150, retained by W., *as he, the witness, understood and presumed*, was about the sum intended to be charged for discount upon the said note," that the expression, "*as he, the witness, understood and presumed*," taken alone and unconnected by others used by him, imported his opinion, and were in themselves inadmissible evidence; but as they could not be separated from the other part of the testimony without doing more mischief than the retaining them would do, they were admissible evidence. It is not necessary to pause here to inquire whether, upon this authority, error can be sanctioned in any case on account of its connection with truth; or how far incompetent evidence can be admissible on account of the connection with competent evidence. It is sufficient to say, that even tested by this adjudication, in the State of Maryland, the court below erred in the admission of the testimony in question in this case.

*II. It is also claimed that the common pleas erred in admitting in evidence the mortgage deed of Vandecker & Crowell, relating to a different transaction, to indemnify sundry persons against their liability as sureties of said Vandecker & Crowell. This instrument, with the accompanying evidence of its execution by Crowell himself, using the firm name, tended to prove by the act and conduct of Crowell, both the existence of the partnership and the name in which the firm did business. We are unable to perceive any valid ground of objection to this item of evidence.

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If it were competent to prove the existence of the partnership and the name of the firm by the verbal admissions, or ordinary business transactions and conduct of the defendant, it would certainly be strange if the same thing could not be shown by the acts of the defendant, Crowell, under the solemnity of his deed.

III. It is insisted further that the common pleas erred in ruling against the competency of Calvin P. Knowlton as a witness on behalf of the defendant, Crowell. This person was the principal on the note, and one of the defendants in the suit who suffered judgment by default. The general rule of the common law that a party to the record, in a civil suit, can not be a witness, either for himself or his co-suitor in a cause, is subject to numerous exceptions. And, it is said, that one of these exceptions is to be found where, in a suit against several defendants, the situation of some of them is essentially changed in the progress of the suit by default or *nolle prosequi*. It has been held that where a suit is ended as to one of several defendants, and he has no direct interest in its event as to the others, he is competent as a witness for them. We learn from the elementary treatise of Greenleaf, on the law of evidence, that, "in actions on contracts, the operation of this rule is generally excluded; for the contract being laid jointly, the judgment by default against one of several defendants, will operate against him only in the event of a verdict against the others; and, accordingly, 415] he has been held inadmissible in such actions as a witness in their favor." The adjudications, however, have not been uniform on this point, either in this country or in England, but it appears that the greater weight of authority is against the competency of the witness.

The case of the Preble County Bank v. Russell, 1 Ohio St. 313, is distinguishable from the case before us. In that case the judgment had been taken, the damages assessed, and the suit finally ended as to the witness Russell, before he was called on as witness; whereas, in this case, Knowlton, who was offered as a witness, was a party to the issue, which the jury was sworn to try, so far as the assessment of damages was concerned.

The original suit in this case was instituted before the code of civil procedure in this state took effect, and, according to the decision of the Supreme Court, in the case of the Clinton Bank of Columbus v. Hart, 19 Ohio, 372, the statute of March 12, 1844, authorizing separate defenses and judgments in suits against the orig-

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nal makers and indorsers of promissory notes or bills of exchange, has no application to suits by incorporated banks.

For the reason, however, of the admission of incompetent evidence by the court below, contained in the deposition of Truman W. Mead, the judgment is reversed, and the cause remanded for further proceedings.

B. F. GREENOUGH ET AL. v. W. SMEAD ET AL.

A gave his name in blank to B as an accommodation to enable B to raise money; B then wrote a promissory note on the other side of the paper, payable to C or order, signed it as maker, and procured the indorsement of C upon the back under that of A; and subsequently procured the indorsement of D, and in this condition got it discounted. *Held—*

That the holder was authorized to treat A as an indorser, and not an original promisor, upon whom demand was necessary to charge the other indorsers.

Such a construction should be put upon the contract as will prevent its failure, and give effect to the obligation of each of the parties appearing on it at the time the contract itself takes effect.

*Whenever the obligation of a party appearing upon the back of a negotiable paper can, at that time, take effect as an indorsement, it should be held to do so as conforming more nearly to the general intention of parties assuming that position upon it. [416]

In the application of these principles, when the name of a stranger is put upon the back of a note intended for a payee, and to give it credit with him, as such person can not be charged as an indorser, effect should be given to his undertaking by holding him liable as a surety or guarantor.

But where the paper is not designed for the payee, and his indorsement is also obtained to give the paper credit with a subsequent party, the party indorsing at the time or before the paper is drawn, may and should be treated as a second indorser.

It is not error to refuse to order the plaintiff, in an action against an indorser, to fill up the indorsement before judgment.

ERROR to the district court of Hamilton county.

The facts of the case, and the questions decided, are fully stated in the opinion of the court.

A. H. McGuffey, Gholson, and Miner, for plaintiff in error.

Morris, Tilden & Bairden, for defendants in error.

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RANNEY, J. An action was brought and recovery had by the defendants in error, in the Commercial Court of Cincinnati, upon the promissory note following:

"\$4,000.

CINCINNATI, 30th May, 1850.

"Sixty days after date I promise to pay to the order of Samuel R. Bates, four thousand dollars, value received.

"GEORGE H. BATES."

Written on the back in the following order:

"B. F. GREENOUGH,

"SAMUEL R. BATES,

"BUTLER & BROTHER."

From the bill of exceptions, taken at the trial, it appears that the note was discounted by the defendant in error, after all the names were upon it, for the exclusive benefit of the maker, George H. Bates. On the morning of the day the note matured, George H. Bates died. It was duly presented at his last place of business, and also at his dwelling-house, and payment requested, and notice of non-payment immediately given to all the persons appearing upon the 416] back of *the note as indorsers. The plaintiff's counsel insist that Greenough was, in fact, and should have been treated by the holders as an original promisor and joint maker of the note with Bates; and, inasmuch as no demand of payment was made upon him, that the indorsers, Samuel R. Bates and Butler & Brother, are discharged from all liability upon it. This is supposed to result from the fact that his name was placed upon the paper before it was indorsed by the payee, and from the position it is there found to occupy.

Notwithstanding the great importance of a definite and uniform rule, fixing the liability incurred by a party to negotiable paper thus situated, a most perplexing contrariety of opinion is found to exist in the reported cases.

In Massachusetts, and several of the New England states, he is presumed, in the absence of proof of a different intention, to be an original promisor.

The cases will be found collected and ably examined, by J. Hubbard, in the *Union Bank of Weymouth v. Willis*, 8 Met. 504. In that case A made a note payable to B, and C put his name in blank on the back of the note. B, the payee, then placed his name in blank, on the back of the note, under that of C.

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In this condition, it was discounted by the plaintiff for A, the maker.

It was held that C was an original promisor, and in an action against B, the payee and indorser, the holders were defeated, because no demand of payment had been made of C. The court regarded itself bound by the previous course of decisions in that state, remarking that if the subject were brought before it for the first time, they "should say, that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete, or within the statute of frauds; or, that he should be treated by third parties, simply as a second indorser, leaving the *payee and himself to settle their respective liabilities [418 according to their own agreement."

Whatever may have been the principle upon which the earlier decisions in New York proceeded, the subject has more recently been fully examined by the Supreme Court of that state in the case of *Ellis v. Brown*, 6 Barb. S. C. 282, and by the court of appeals, in *Spies v. Gilmore*, 1 Comst. 321, and *Hall v. Newcomb*, 7 Hill, 416.

These cases seem to affirm that he can only be made liable as a second indorser; that he is within the protection of the statute of frauds, and therefore parol evidence is not admissible to show that he intended to bind himself as an original promisor or guarantor. That the indorsement is entirely nugatory until the note has been indorsed by the payee, and that he is then to be charged by a subsequent holder only upon due demand of the maker and notice thereof.

In Ohio, the case of *Champion & Lathrop v. Griffith*, 13 Ohio, 228, followed by *Robinson v. Abell*, 17 Ohio, 42, has settled that the mere indorsement upon the note, of a stranger's name in blank, is *prima facie* evidence of guaranty. That to charge such person as maker there must be proof that his indorsement was made at the time of execution by the other party, or, if afterward, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution; that such agreement or intention may be proved by parol evidence; and that the rule is the same, whether the instrument is negotiable or not.

The difference amounts to this: in Massachusetts such a party is

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presumed to be an original promisor; in Ohio he is presumed to be a guarantor; but in either state parol evidence is received to rebut the presumption and show what liability it was intended he should assume, and what relation he should sustain to the paper. In New York he is presumed to have intended to assume the liabilities of an indorser, and parol evidence is not admissible to show a different intention.

419] *We are not disposed to doubt the correctness of the rule laid down in the decisions already made in this state, when confined to the facts of the several cases in which it has been applied. This rule admits parol evidence to ascertain the intention of the parties, and requires us to consider what evidence was before the Commercial Court.

From the bill of exceptions it appears that the note was indorsed by all the parties for the accommodation of Geo. H. Bates. That Greenough indorsed it before it was filled up; that Geo. H. Bates on the same day filled up the note for \$4,000, payable to the order of Samuel R. Bates, whose indorsement he then procured, and subsequently that of Butler & Brother. In this condition he took it to the defendants in error, and procured it to be discounted. It further appeared from the testimony of Greenough, who was called and examined as a witness for Butler & Brother, that he had been in the habit of exchanging accommodation indorsements with Geo. H. Bates; that Samuel R. Bates had usually been a party to this paper, and that whenever it was intended that he should be the first indorser, his name was used as the payee. That without having any distinct recollection of this particular note, he was able to say from the course of business between them that he intended to authorize Geo. H. Bates to make him appear in any character upon the paper that would best serve the purpose of raising the money. This constituted a general letter of attorney to Bates to bind Greenough in any form he saw fit; but while it obligated Greenough to submit to any obligation that Bates saw fit to impose upon him, it also entitled him to the full benefit of any arrangement that Bates intended for his benefit. Looking at the transaction fairly, we can not doubt that Bates, the maker, and his brother, the payee, intended to bind him as one of the indorsers of the paper, and to impose upon him all the obligations, and secure him all the privileges of that position; and that such was the understanding of Butler & Brother is perfectly manifest from the declarations of

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one of them, made after the note had *been protested, in [420 which he treated Geo. H. Bates as the sole party primarily liable.

But if this testimony is left entirely out of view, and we have nothing but the fact that the note was discounted for the sole benefit of the maker, and became first legally operative when received by the defendants in error, we are still brought to the same conclusion.

In the common understanding of business men, it is very seldom supposed, that one placing his name on the back of a note becomes primarily liable for the payment of the debt. This understanding ought to be no further interfered with than is absolutely necessary to give full effect to the lawful contracts of parties, and afford a remedy to the creditor commensurate with what he may be presumed to have expected when the promise was made. To do this, it is only necessary to give effect to the undertaking of each of the parties upon the paper, precisely as they appear at the moment the instrument itself takes effect and becomes legally operative. If he then appears to be a stranger to the title, he must assume the position and responsibilities of a stranger, and as he can not in such case be charged as an indorser, and as it can not be supposed that he did not intend to bind himself in some way, he must be charged as a maker or guarantor. This will happen in all cases where the paper is designed for the payee, and the name of the stranger is put on the back for his security. Such were all the cases yet decided in this state. There was no middle course; either the undertaking which the party intended to assume, and upon the faith of which the creditor had parted with his money or property, must take effect in that manner, or it was nugatory and without any effect whatever.

Nor would his position or responsibilities be changed, although the payee should afterward transfer the obligation. Once impressed with the character of maker or guarantor, they remain the same into whose hands soever it may come.

But the case is widely different when the paper is not designed for the payee, and the arrangement contemplates *his indorsement as an accommodation party also, before it is used. In such case, there is no obligation incurred, no contract made, until the note is accepted by the person advancing the consideration upon it. Where it is so accepted, it then, for the first time, has its effect. It then has the indorsement of the payee, to transfer it to the party

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whose name is already upon it, evidencing his willingness to receive and transmit the title, and in his turn to assume the responsibility of an indorser when the note shall have accomplished its purpose, by being accepted by the party becoming beneficially entitled thereto. The order of this indorsement, in point of time or locality, is of no importance, but it is controlled wholly by the order contemplated by the *contract* of indorsement. *Chalmers v. McMurdo*, 5 Munf. 252. The fact that the party indorsed before the payee, as was well said by Spencer, J., in *Herrick v. Carman*, 12 I. 161, "can have no influence, for he must have known, and we are bound to presume that he acted on that knowledge, that, though the first to indorse, his indorsement would be nugatory, unless preceded by that of the payee."

Two governing principles should be kept constantly in view: 1. That such a construction should be placed upon the contract as will prevent its failure, and will give effect to the obligation of each of the parties appearing upon it at the moment the contract itself takes effect—*ut res magis valeat quam pereat*; 2. Whenever the obligation of a party appearing upon the back of negotiable paper can at that time take effect as an indorsement, it should always be held to do so, as conforming more nearly to the general intention of the parties assuming that position upon it.

The first of these principles is disregarded by the present holding of the courts in New York, in treating as nugatory the obligation assumed by a stranger to the paper when it is designed for and received by the payee, and when the name is indorsed to give credit to the paper with him. The last is disregarded in the case cited from *Metcalf*, in pushing the principle of original liability beyond 422] the necessity of its *application, and when, at the moment the contract is consummated, the obligation of the party thus situated can and should have effect as an indorsement.

In New York, the present holding is directly opposed to a long series of earlier decisions, as is abundantly proved by the dissenting opinions in *Hall v. Newcomb*, and *Ellis v. Brown*, in which the very distinction we have made is recognized and enforced; while in *Massachusetts*, not one of the numerous cases cited by the court in *The Union Bank v. Willis*, had carried the principle beyond the liability assumed for the benefit of the payee.

Two states of the case may be supposed, in neither of which would Smead & Co. be obliged to treat Greenough as an original

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promisor. If the paper upon its face placed him in that position, yet, if in point of fact the arrangement between the parties was such as to entitle him to the privileges of an indorser, no demand need be made upon him, for the other indorsers, having no recourse against him as maker, could lose nothing for the want of it.

On the other hand, if he appeared to be an indorser, but in fact as between him and the other indorsers he had agreed to assume the responsibilities of maker, yet Smead & Co., having no notion of such an arrangement, would not be bound to regard it.

In our opinion, not only the paper upon its face presented him as an indorser, but the evidence given also comes to the same result, and shows him a joint accommodation indorser with the other parties appearing upon the back of the note; and as such, under the ruling in *Douglas v. Waddle*, 1 Ohio, 413, liable only for his proper proportion of the debt, as a co-security.

This view of the subject makes it unnecessary to pass upon the question made, as to the sufficiency of the demand. It may not be improper, however, to say, that if Greenough could be treated as a joint maker, we should be of the opinion that the demand made, or rather the excuse for not making a demand, would be insufficient to charge the indorsers.

*The question is not covered by the case of *Harris v. Clark*, [423 10 Ohio, 5, and we feel no hesitation in saying that the rule there adopted should be confined to the precise state of facts upon which the decision was made. A demand upon one of several partners in business is clearly sufficient, and the court, in that case, considered the several "makers of a joint and several promissory note *in the light of partners in that particular transaction*." But surely the principle could have no application after the death of one of the parties had terminated the implied agency of the survivor; and it could not be deemed due diligence in the holder to present the note at the residence of the deceased partner, when the survivor was within his reach.

It is also assigned for error, that the court refused to require the plaintiffs to fill up the blank indorsements, upon the trial. In this we think there was no error. When the plaintiffs gave the note in evidence, with the names of all the defendants upon it, they at the same time established the liability of them all, and title in themselves. They were as well entitled to the legal presumptions and inferences to be drawn from the face of the paper as they were to

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what was fully expressed in it. All this belonged to its construction and legal effect, and as they claimed nothing more, there was no occasion for writing out what the law presumed without it. The name of the payee appeared, transferring the title; and while it is true that the precise order in which it had passed to and from the other indorsers, might not be apparent, a sufficient answer is, that that this was wholly immaterial. In no possible case could it defeat the title, or be a defense for any one of them.

If the plaintiffs had endeavored to establish a liability not resulting from a fair construction of the paper itself, there would have been great propriety in compelling them to specify the precise nature of the undertaking, and of confining the evidence to its support; but when nothing but the legal consequences of the instrument are invoked, we can *see no possible benefit to accrue to the defendants from complying with such a demand, unless it should be the very illegitimate advantage arising from the plaintiffs having mistaken their legal rights.

The judgment of the district court is affirmed.

CHOTEAU, MERLE, AND SANDFORD v. THOMPSON AND CAMPBELL.

- A mortgage lien to indemnify mortgagees against loss by reason of their having accepted drafts for the accommodation of the mortgagors, is not necessarily lost by a change of the evidences of liability, as where the first acceptances are taken up with the proceeds of like acceptances made for that purpose.
 - A waiver of objection to the competency of a witness so as to allow his deposition to be taken in a cause, is a waiver during the whole progress of the cause, and the objection can not be insisted on when the witness is called to give a second deposition in the same cause.
- The practice in Ohio is to take the deposition of a defendant in chancery without leave; subject to the right of the party against whom it is taken to except to it.

In chancery. Reserved in Hamilton county

Under the order of reference in this case (see 2 Ohio St. 114), the complainants took further testimony; among others, that of Wm. H. Campbell, which was in substance as follows: The accept-

ance of Choteau, Merle & Sandford to four drafts; one dated June 22, 1847, for \$4,000, at six months, drawn by Thompson & Campbell; one dated July 3, for \$1,500, at six months, drawn by Thompson & Campbell; one dated June 21, 1847, for \$2,000, at four months, drawn by E. Davis, in favor of Thompson & Campbell; and one dated June 19, 1847, for \$2,500, at four months, drawn by Thompson & Campbell, are in the handwriting of Guillaume Merle. Was a member of the firm of Thompson & Campbell during the time the drafts were made. E. Davis was the agent of Choteau, Merle & Sandford, at Cincinnati, during that year. The name on the draft drawn by *him is in his handwriting. There was [425 a letter of credit given according to the proviso in the mortgage, and under that letter of credit, Choteau, Merle & Sandford became liable for \$5,000, which amount is still owing by Thompson & Campbell. We drew three separate drafts against that letter of credit; one dated October 9, 1845, for \$2,000; one dated October 21, for \$1,500; and one dated November 3, for \$1,500. Do not know where that letter of credit is; the cashier of the Lafayette Bank can not find it. It was deposited in the Lafayette Bank when we negotiated the drafts there. The purport of it was to authorize us to draw to the amount of \$5,000 upon themselves. We received another letter of credit from Choteau, Merle & Sandford, in July, 1846. We used it by having drafts discounted at the Lafayette Bank; one, July 30th, for \$1,500; one, August 17th, for \$2,000; and another, September 12th, for \$1,500. The four drafts first described have this connection with the six drawn under the letters of credit—the debt is the same that was originally intended to be secured by this mortgage. The original drafts were renewed, sometimes for the same amounts, and sometimes for different amounts, owing to the state of the money market and the facilities for getting a discount. Since the drawing of the six first drafts, the liabilities of Choteau, Merle & Sandford have never been less than \$10,000 on the letters of credit. The drafts may have been temporarily reduced two or three thousand dollars by their payment by Choteau, Merle & Sandford, before renewing them. There were always drafts out to the amount of seven thousand dollars. The first six drafts were negotiated on the same day they were dated, or within a day or two afterward. Choteau, Merle & Sandford paid all the drafts. We remitted the money to them, and charged it to them. Four or five days before a draft matured in New York, I got

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another one discounted, and remitted the money to Choteau, Merle & Sandford to pay the one maturing. From the time the first mortgage was given, the five thousand dollars was never decreased. 426] After the second mortgage was given, and *the drafts were increased to ten thousand, Choteau, Merle & Sandford were liable for that amount all the time, except on the one or two occasions of the reduction to seven or eight thousand by their payments.

On this testimony, and other evidence relating to the other claims, the master reported adversely to the claim of Gregory, Burnet & Co., favorably to that of Bailey & Smiley, on lots 23 and 24, against the claim of Bradford & Co., as wholly unproven, recognizing the lien of Greenwood as fully established, and giving preference as to the fund representing lot 23 to the claim of Choteau, Merle & Sandford. In a written paper submitted to the master, Choteau, Merle & Sandford abandoned all claim to a lien under the several extensions of the mortgage, and relied on the first mortgage alone.

The defendants excepted to the report of the master as follows:

1. Because the master reports the priority of lien on lot 22 in favor of the complainants, Choteau, Merle & Sandford, when, from the evidence and exhibits in the case, it should be in favor of the claim of said Greenwood.

2. Because the claim of the complainants, as set forth in their bill and exhibits, and the accounts attached to the answer of Choteau, Merle & Sandford to the cross-bill of Greenwood, as well as the account attached to the former deposition of Wm. H. Campbell, show that nothing is due to complainants on account of any claim under said mortgage, prior to the 14th day of January, 1847, the time at which Greenwood's lien attached.

3. Because from the evidence it appears that Campbell & Thompson, the mortgagors, were carrying on said mills for the joint interest of themselves and complainants (the mortgagees), and their claim should have been postponed to the liens of the mechanics who furnished the machinery, engines, work, and materials for the same.

4. Because the master received and acted on the testimony of 427] Wm. H. Campbell, one of the defendants (which *is incompetent), and because the same was not authorized by the court to be taken; and because the evidence of said Campbell does not

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establish the priority of complainants' claim, and is inconsistent with the complainants' claim, as made by their bill.

5. Because said report is in other respects contrary to the evidence.

Woodruff & Hopkins, for the exceptions.

Mills & Hoadly, for complainants.

THURMAN, C. J. We think the testimony fully warrants the finding of the master, that \$5,000 of the present indebtedness of Thompson & Campbell to the complainants, originated in 1845, and is covered by the original mortgage, executed by the former to the latter. True, the evidences of indebtedness were, from time to time, changed; that is, the first acceptances of the complainants covered by the mortgage, were taken up by the proceeds of other drafts of Thompson & Campbell, drawn upon and accepted by the complainants; and this process of renewal went on until the amount of the original acceptances, \$5,000, was embraced in the drafts mentioned in the bill. This was done without any intention of releasing or varying the mortgage security; the debt continuing without the least interruption, though the evidences of it were different at different times. That these changes in the mere evidences of indebtedness did not affect the lien of the mortgage is very evident from the cases of *Patterson v. Johnson*, 7 Ohio (pt. 1), 225, and *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65. As this lien is of an earlier date than that of either of the other parties to the suit, the master was correct in giving the complainants the priority complained of.

I have spoken of the first acceptances given by the complainants as creating a debt due them from Thompson & Campbell, the latter having been debited with them according to mercantile usage in such cases. But if it be more proper to say that they merely constituted the relation of *principal and surety between the parties, and that the mortgage is to be regarded as an indemnity merely, the case will not be different in principle, as the before-mentioned authorities fully show. This disposes of the first two exceptions.

The third exception is unfounded in fact. The testimony does not show that the mills were run for the joint interest of Thompson & Campbell and the complainants. There was no community

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of profit and loss, nor any joint ownership of property between them. On the contrary, the latter were merely the commission merchants of the former, receiving and selling property, and making advances as commission merchants are accustomed to do.

As to the fourth exception, Campbell was a competent witness. If he was not wholly disinterested, as complainants contend, it must be admitted that his interest was, at least, evenly balanced.

Besides, his first deposition was taken and used without objection. If he is incompetent now, he was equally so then, and the parties knew it. Having failed to except to that deposition, they waived the objection to his competency; after which they could not interpose it to prevent his again testifying in the same case.

That his deposition was taken without a previous order of court is immaterial. The practice in Ohio is to take the deposition of a co-defendant in chancery without leave, subject to the right of the party against whom it is taken to except to it. This practice is indispensable to prevent delay, especially in the courts that sit but once a year.

The deposition does, with the other testimony, establish the priority awarded to the complainants by the master; and if it is inconsistent with the allegations of the original bill, which we do not affirm, that objection is removed by the amendment to the bill.

The last exception is, that the report is contrary to the evidence. We do not think so.

As to the suggestion made at bar, that some parts of the machinery on lot No. 22 were not fixtures, and therefore the complainants' mortgage was not a lien upon them, I may remark, first, that no such pieces of machinery have been specified; secondly, that the objection sounds rather strange in the mouth of a party setting up a mechanic's lien upon this very machinery as a part of the freehold; thirdly, that it comes too late after all the parties, pleadings, and orders of appraisement and sale have treated the property as a part of the realty, and it has been appraised and sold as such; and lastly, that we see nothing in the evidence to satisfy us that its true character has been mistaken.

The exceptions to the master's report must be overruled, the report confirmed, and a decree be entered accordingly.

HENRY SWANK v. THE STATE OF OHIO.

In an action of debt upon a forfeited recognizance, a plea that the surety and prisoner were present at the appearance term, and that, by their consent, the case was continued until the next term, and that the surety then and there agreed to stand bail for the prisoner's appearance at the next term, and that, after the continuance, the prisoner was called, and the recognizance forfeited, is not a good plea in bar.

A recognizance in a criminal case, conditioned "that the prisoner appear at the next term and thereafter, from day to day, and abide the judgment of the court, and not depart the court without leave," binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourns without making any order, the sureties are exonerated from their recognizance.

During the appearance term, a new recognizance should be taken, or the prisoner committed to the jail of the county.

Such recognizance may be taken either at the term of the continuance, or at any day thereafter during the term, and the prisoner may be called for that purpose after the continuance of the case, and if he fails to appear, his recognizance may be forfeited.

In an action of debt upon a recognizance, where the defendant pleads *nul tiel* record and *nil debet*, and the finding of the court is on the plea of *nil debet* only, and nothing is said about the plea of *nul tiel* record, it is a finding, in substance, that there was such a record, for the reason that the existence of the record was necessarily involved in the issue of *nil debet*.

When a plea is so defective that the court, if the plea was found to be true, would be bound to enter judgment *non obstante veredicto*, the defendant is not prejudiced by the court or jury not passing upon such plea.

*ERROR to the district court of Knox county. Scire facias [430 on a recognizance taken in a criminal case.

The facts of the case and the questions involved, appear in the opinion of the court.

Sapp, Delano, and Smith, for plaintiff in error.
Dunbar, for the state.

KENNON, J. The scire facias shows that Peter Masters was arrested on a charge of larceny, and committed to jail in Knox county. That at the July term, 1848, of the court of common pleas of Knox county, Masters, with the petitioner in error, entered into a recognizance in the usual form, in the sum of four hundred

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dollars, conditioned for the appearance of Peter Masters at the next term of said court, and on the first day thereof, and thereafter, from day to day, to answer unto a charge of larceny, and abide the judgment of the court, and not depart the court without leave. That afterward, at the next term of said court, to wit, on the 11th day thereof, Masters was three times solemnly called to come into court to answer the indictment found against him. That he came not, but made default. That Henry Swank was likewise called three times to bring into court the body of Masters, but he also made default. That thereupon the said recognizance was declared by said court to be forfeited, all which fully appeared by reference to the recognizance on the records of said court, and the record and entry of said forfeiture on the minutes of said court, which still remained in full force. After the return of the sheriff to the scire facias, the state declared in debt in due form upon the record of the recognizance.

To this declaration the defendant below pleaded three pleas :

1. *Nul tiel* record.

2. *Nil debet*.

3. A special plea, the substance of which is, that the defendant, in 431] the court below, at the term of the court at *which Masters was, by the recognizance, bound to appear, did appear with the said Masters, and that the said court then and there ordered the said cause of the State of Ohio against the said Masters to be continued until the next term thereafter, with the consent of the defendant, who was then and there in open court and consented that the cause should stand continued until said next term, and then and there agreed that he would stand good as security aforesaid for the appearance of Masters at the next term of said court. That at the said appearance term, and after said continuance, the court of common pleas, without the knowledge or consent of the defendant, ordered the recognizance to be forfeited. Issue was taken upon these pleas. The cause was submitted to the district court, without the intervention of a jury, and the entry of the court is in these words : "And the court being fully advised in the premises, do find that the said Henry Swank doth owe to the said State of Ohio the sum of five hundred dollars, and the court being satisfied that there were no reasonable grounds for the appeal, etc., assess twenty-five dollars as damages, being five per cent, on said sum of five hundred dollars, according to the statute in such cases made and pro-

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vided. Whereupon it is considered and adjudged, that the said State of Ohio recover of the said Henry Swank the sum of five hundred dollars, her debt aforesaid, and the said sum of twenty-five dollars, her damages aforesaid, and her costs taxed at blank dollars."

Upon this record, it is assigned for error :

1. That the district court erred in not passing upon the plea of *nul tiel* record.
2. That the district court erred in not passing upon the special plea, upon which the state had taken issue. And,
3. That the judgment should have been rendered for the defendant.

The counsel for the petitioner in error, seems to have strong faith in the correctness of his position thus taken, for he makes an affidavit to the petition ; and the counsel *for the defendant [432 in error has equally strong faith, for he answers the petition, and makes affidavit to the answer. It might here be observed, that such affidavits were wholly unnecessary, in this case, and ought not to have been made.

The first question to be determined is, whether the third, or special plea, filed in this case, is a good bar to the plaintiff's right to recover; for, if it is a bar, then it is very clear that the court have not passed on that plea. The finding of the court can not fairly be construed to cover that plea, and according to all, or nearly all, the authorities, the judgment must be reversed. But is this a good plea?

The conditions of the recognizance are in these words : That if the said Peter Masters shall personally be, and appear before the court of common pleas of Knox county, on the first day of next term thereof, and thereafter, from day to day, to answer to a charge of larceny, and abide the judgment of the court, and not depart the court without leave, then the recognizance to be void. The object of taking the recognizance or a commitment, is, to secure the attendance of the prisoner at the trial, to have him there in person, in order that the judgment of the court may be executed upon him. Indeed very few steps can be taken in court against him, without his personal presence ; he is to be in attendance when called upon, during the term of his appearance, to abide the judgment of the court, and not depart the court without leave.

In this case, the record shows, and the plea does not deny the

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fact, that he was solemnly called to come into court at the appearance term, and came not; that his sureties were also called to bring him to court, and came not. That his default was entered, and his recognizance declared to be forfeited. The petitioner in error, says this is all true enough, but answers by the plea under consideration, that is to say, that by consent the cause was ordered to be continued until the next term, and that he then and there agreed that he would stand security for Masters until the next term there-
433] of; *that after the continuance, the recognizance was forfeited without his knowledge or consent.

The question under this plea seems to me to be this: Does the court lose its power over the prisoner by postponing the time of trial? Does the continuance itself discharge the surety from the recognizance? Is the continuance of the cause a *leave* granted by the court to the prisoner to depart; for the condition is that he shall not depart the court without leave; that he shall appear at the first day of the term, and thereafter, from day to day, and not depart without leave. It often happens that on the first day of the term the prisoner shows good cause to the court why the case should be continued until the next term. The state may not be ready for trial, and she may claim a continuance. The court in either case may grant the motion, and the *trial* is postponed until the next term of the court. Is the mere entry of the continuance a leave granted by the court to the prisoner to depart? If so, are the sureties bound for his appearance at the next term? The sureties have bound themselves only for his appearance and presence during the first term, and their obligation can not extend beyond their written obligation, and they are not bound for his appearance at a time not named in the recognizance. Then all the prisoner has to do, so soon as he obtains a continuance of the case, is leave the court, when the intention of the court was to grant no such leave, and thereby avoid his own obligation and exonerate his sureties.

In the case *Keefhaver v. The Commonwealth*, 2 Penn. 241, Chief Justice Gibson, in his opinion, says that "*recognizances*, being for the appearance at the *next*, and not at any succeeding term, are to be discharged at the end of the term by committing the prisoners, delivering them on bail, or setting them at large. But to avoid the trouble of renewing the security, it is sometimes the practice, when the bail consent, to forfeit the recognizance and respite it until the next term; and this answers the purpose perfectly well."

*Before the expiration of the term it is the duty of the [434 state to have the prisoner called, require a new recognizance for his appearance at the next term thereafter, and on failure of the prisoner to enter into the new recognizance, he should be committed to jail.

The continuance of the cause for trial to the next term has nothing to do with the proper mode of securing the attendance of the prisoner at that term. Indeed, until the continuance takes place, upon the motion of the state or prisoner, it can not be known that the attendance of the prisoner will be required at the next term, and no recognizance could be required of him to appear at a subsequent term. It is the *continuance* which creates the necessity for the new recognizance.

We think no other construction can be put upon this recognizance, and that at the time of the continuance, or at any time thereafter, during the appearance term mentioned in the condition of the recognizance, the prisoner may be called and required to enter into a new recognizance, and in default of giving the bail required by the court, he may be committed to the jail of the county. That if he does not appear when called, he has failed to comply with the condition of his recognizance, and the court may well declare his recognizance forfeited.

This plea, however, goes one step further, and says the sureties agreed to stand for his appearance at the next term. How, or with whom they agree, does not appear; but nothing of that kind, short a new *recognizance*, would exonerate them from the obligation of their first recognizance, and this the petitioner in error does not by his plea claim.

This plea, therefore, in the opinion of this court, was no defense to the action, and if the case had been submitted to a jury, and they had found this plea to be true, and had found the issues on the plea of *nul tiel* record and *nil debet* in favor of the state, the court should have rendered judgment for the plaintiff. So that the defendant below had not been injured by the court not passing on this plea. So far, therefore, *as this plea is concerned, there is no error. [435 Still it is a very clear proposition that the verdict of the jury, or finding of the court, must respond to all the issues made up between the parties, where those issues are *material*.

It is claimed, in this case, that the finding of the district court was no answer to the plea of *nul tiel* record, and therefore the judg-

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ment is erroneous. The finding of the court is in these words: "We do find that Henry Swank doth owe to the State of Ohio the sum of five hundred dollars." Nothing is said about the plea of *nul tiel* record. The court, however, will not reverse a judgment entered upon an *informal verdict*, if it substantially answers the plea. Indeed, it is not claimed that this finding is not a substantial answer to the plea of *nil debet*. The finding may be informal, but is a response to that plea. When put in form, it would read thus: "We find that Henry Swank doth owe to the State of Ohio the sum of five hundred dollars, in manner and form as the plaintiff hath declared against him." There is but one count in the declaration, and that is founded on the recognizance for the payment of five hundred dollars. Taking, therefore, the whole record, the issue, and the finding of the court, and it is quite manifest that the finding of the court is a full answer to the plea of *nil debet*, and that the five hundred dollars were due upon the recognizance. This plea of *nil debet*, however, puts in issue every material fact stated in the plaintiff's declaration. Such facts are not only put in issue by that plea, but the proof is thrown on the plaintiff, and if he fails to prove *any fact material to his right of recovery*, the court or jury, as the case may be, must find for the defendant on that issue. On the trial of the issue of *nil debet*, it was very material for the plaintiff to produce the record described in his declaration. It was the very foundation of his action. Surely, then, this court may safely say that the district court did pass upon the plea of *nul tiel* record in their finding upon the plea of *nil debet*.

The case under consideration would be not much unlike a case in 436] *assumpsit*, in which the plaintiff, in his declaration, *alleged a promise on the part of the defendant, to be by him fulfilled upon the performance of a condition precedent on the part of the plaintiff, and the plaintiff had averred a performance on his part of the condition precedent; to which the defendant had pleaded: 1. Non-performance of the condition precedent; and, 2. Non-assumpsit, and the jury found that the defendant did assume and promise, in manner and form, etc., but did not, in terms, pass upon the plea of non-performance of the condition precedent. Under non-assumpsit, the jury must have found the performance of the condition precedent, and in such a case, who could doubt but that judgment should go for the plaintiff? There is little if any difference between the case but and the one now under consideration.

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Before this court would reverse a judgment, under such circumstances, it would require some authority in point requiring such reversal. Upon this point, the counsel for the petitioner in error, has referred us, among other authorities, to the following decided cases: *Headly v. Roby*, 6 Ohio, 524; *Hewson v. Saffin & Smith*, 7 Ohio (pt. 2), 232; *Martin v. The Clinton Bank*, 10 Ohio, 197; 5 Ohio, 227, and 9 Ohio, 131; and particularly to *Gatewood v. Palmer*, 10 Humph. (Tenn.) 466, which is said to be *exactly* in point. With the exception of this last case, which we could not obtain, we have carefully examined the other cases, and find that the case under consideration does not fall within the principle decided in any of those cases. Indeed, the case of *Martin v. The Clinton Bank*, is a very strong authority against the petitioner.

That was an action of assumpsit to which the defendant pleaded: 1. Non-assumpsit, and then two special pleas in bar, one of which alleged that the bill of exchange was procured by a corrupt agreement on the part of the bank to obtain usurious interest, and was therefore void. The jury found that the defendant did assume and promise in manner and form, etc., and assessed the damages upon which judgment was rendered in favor of the bank. The court in bank *affirmed the judgment, although nothing was said in [437 the verdict about either of the special pleas. The court, in refusing to reverse the judgment, said in substance: "If the *defendant* below had proved the special plea, the bill would have been void, and therefore the jury could not have found that the *defendant* *promised*, without passing on the special plea." The difference between the two cases is this: in the case under consideration, unless the *plaintiff* proved that the *defendant's* plea of *nul tiel* record was *untrue*, the court could not find that defendant owed. In the case in 14 Ohio, unless the defendant failed to prove his plea true, the *plaintiff* would be entitled to recover. They are both decided upon the principle that where the jury, in passing upon one issue, necessarily decide another, judgment may be entered upon the verdict, although the other issue is not *mentioned*. The case in 10 Humphrey, upon which the counsel for the petitioner relies as a decided case exactly in point, is this, according to their statement of the case: "The defendant pleaded *nul tiel* record and payment; the jury found a verdict, and judgment was rendered for the plaintiff, on the plea of payment; but there was no finding on the plea of *nul tiel* record, and it was held that the judgment was erroneous, and must be re-

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versed. It is not stated what the finding of the jury was, except that there was no finding on the plea of *nul tiel* record." I suppose from the statement, that the jury found that the defendant had *not paid the claim* or debt. In such a finding, it by no means *necessarily* follows that because a claim was not paid, that it therefore once existed, and was founded on a record. The case, as reported by counsel for the petitioner, would have very little weight in the decision of this case. It by no means militates against the principle claimed in favor of affirming this judgment.

Upon the whole, this court is of opinion that there is no error in the record, and the judgment will therefore be affirmed, with costs.

438] *DAVID M. BAKER v. MILES JORDAN.

Growing corn may be reserved by parol from the operation of a deed in common form, for the land whereon it grows.

Growing corn may be part of the realty for some purposes, but it is generally to be considered as personalty.

If the parties to a deed, either by words or in their behavior, signify their understanding that, as between them, the crop is personalty, the law will so regard it, and will respect their intention in the construction of the deed.

When the evidence of such understanding is produced, it is not to contradict the deed, for with that, it is perfectly consistent; but it is to show that what in some instances would go with the land as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect.

ASSUMPSIT; reserved in Vinton county

It appears from the bill of exceptions, that proof was given, to the satisfaction of the district court (to which, without the intervention of a jury, the cause was submitted), that on the 18th of August, 1847, the plaintiff verbally contracted for the purchase, from the defendant, of certain real estate, whereon there was standing a number of acres of corn. Two days afterward, the deed was made, containing no reservation or exception of the crop. The defendant then offered to prove a parol reservation of the corn at the time of making the said contract. The plaintiff objected. The evidence was received, subject to the objection, and

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the defendant proved, to the satisfaction of the court, that there was such parol reservation at the time of the contract, but nothing said about it when the conveyance was executed. The evidence was admitted upon an equal division of the judges as to its admissibility. The finding being for the defendant, the plaintiff moved for a new trial, and the court being equally divided upon the motion, by consent of parties, the case was reserved for decision in in this court.

Keith & Stanley, for plaintiff.

Hanna & Jewett, for defendant.

*WARDEN, J. That growing corn will pass by common [439 deed of the lands whereon it grows, when no valid conversion of it into personalty is shown to have preceded the conveyance, can not be doubted. But whether such a conveyance always purports to carry the title to growing crops, is another question. Many things may be in or on the ground when a deed is made, which the parties do not intend, and which no inflexible rule of law requires to fall under the conveyance. Such things are realty or personalty, according to the intention of the parties. Lands may be sold while under lease; the lessee may have built, for manufacturing purposes or the like, with the right, as between landlord and tenant, to remove his buildings at the end of his term; in such a case, would a deed to a stranger purport to convey the buildings? It is certain, that when the vendor is in possession, and has himself made such erections on his lands, they would pass by his deed. Why not, then, construe the deed as pretending to convey them in every case? And why admit proof outside of the deed, to show that the buildings were of the nature first supposed, and thus to manifest the understanding of the parties that they were not touched by the conveyance? Is it not because such proof does not vary, enlarge, diminish, or contradict the deed, that it is admissible, as an answer to whatsoever complaint the vendee may prefer, on the ground that he has failed to get what his deed purports to convey?

When we consider the case of a parol sale of growing corn to A, and a subsequent deed of the land to B, while the corn continued to grow on the land, we must allow that proof of such sale, and notice of the fact given to B, when he took his deed, would estab-

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It is satisfactory that the parties to the deed never intended to treat the corn as part of the realty, or as within the conveyance. Does the evidence of such intention vary or contradict the deed? I think not. But these are all cases in which the vested, fixed rights of some third person are involved.

440] *However little favor should be shown to reservations made by the vendor by parol, when he is in possession, there must be some such reservations which are valid. It is, in such instances, a question of intent. Where that intent relates to things which may sometimes be treated as realty, and sometimes as personalty, the evidence of its manifestation in the conduct of the parties, or in their words, at the date of the deed, does not seem to alter, enlarge, or limit their written contract. For, as already observed, that contract does not necessarily embrace such things.

The case of a deed, then, is clearly distinguishable from that of many other written contracts. What such an instrument purports to convey, is to be known from the legal rules which have assigned to it a definite legal character. And when those rules are attentively considered, it will be found that the common words describing the ground conveyed, must always leave it an open question, whether the growing crops were intended as part of the thing, in which the property was to change. In the absence of any proof that any other valid disposition of them attended, or had preceded the deed, that instrument would certainly convey them. But proof of such other disposition would as certainly withdraw them from the conveyance, where the right of any third person interposed itself. Is there any reason for holding that other disposition void, because it was between the parties to the deed, and none other? If not, is such disposition void because the evidence of it is not carried into the writing of conveyance, on any presumption that all the agreement is therein witnessed?

This question is not without difficulty. Among the purely artificial rules of evidence, none much more commends itself to regard than that which forbids the parties to a solemn contract, reduced to the certainty of a writing, to alter, vary, limit, enlarge, or contradict what they have thus made certain, by the recollections of witnesses, attempting to show what the parties said before or at the time of signing the contract. If, in some instances, the strict ob-

441] servance of this *rule may work hardship, such cases are so exceptional, and the reason of the rule is so evident, that nothing

less than the caution of a chancellor can make a safe departure from it, to correct or set aside the solemn evidence of what the parties have agreed or declared.

From the wise policy of that rule of evidence we are not disposed to depart. But, after a careful examination of the question, and notwithstanding some contrary opinions elsewhere, we have felt it our duty to respect the common understanding of our people on this subject. Custom in Ohio, if not in most of the states, treats growing crops as personalty, even where the strict law laid down by some of the courts would not allow it to assume that character. It would not be difficult to establish that growing wheat, corn, and the like, are generally looked upon as though severed from the land, when a conveyance of the latter is made. On this subject, a section in Greenleaf's Evidence, 337, deserves attention: "Upon the same principle, parol evidence of usage or custom is admissible 'to annex incidents,' as it is termed; that is, to show what things are customarily treated as incidental and accessorial to the principal thing which is the subject of the contract, or to which the instrument relates. Thus it may be shown by parol that a heriot is due, by custom, on the death of a tenant for life, though it is not expressed in the lease. So a lessee by deed may show that, by the custom of the country, he is entitled to an away-going crop, though no such right is reserved in the deed. This evidence is admitted on the principle that the parties did not intend to express in writing the whole of the contract by which they were to be bound, but only to make their contract with reference to the known and established usages and customs relating to the subject-matter. But, in all cases of this sort, the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict that which is written. This rule does not add new terms to the contract, *which, as already shown, can not be done; but it shows the [442 full extent and meaning of those which are contained in the instrument." Now, it is to be observed, that our courts are to take notice of a usage far more respectable than any of the customs above alluded to—a usage showing a common acceptance and understanding of the rules relating to growing crops, which appears rightly to interpret their spirit and purpose. "It has been sometimes said," observed Lord Ellenborough, "*communis error facit jus*; but

I say, *communis opinio* is evidence of what the law is—not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice.” *Isherwood v. Oldknow*, 3 M. & S. 396. This language has more fitness, perhaps, when the opinion of lawyers is that respected; but it is not without force when related to a popular construction of the law, which is not forbidden by its terms. Applied to the common understanding of the legal rules respecting growing crops, it seems entitled to regard. In our statute law, it is written, that “the emblements or annual crops raised by labor, and whether severed or not from the land of the deceased at the time of his death, shall be assets in the hands of the executor or administrator, and shall be included in the inventory.” What more natural than such an enactment in a community like ours? The law harmonizes with the common understanding; and that common understanding itself perfectly agrees with other rules of law on the same subject. In the excellent work of the late Mr. Gwynne, those rules are thus stated: “Wheat, growing, is a chattel, and may be levied upon, under an execution against a defendant who is raising it on land of another. Such annual productions or fruits of the earth as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are not personal property, but incidents to the land. Everything produced by annual planting, cultivation, or labor, such as corn or potatoes, may be sold on a *fi. fa.*, even when growing and immature. In such a case, the sheriff may 443] *wait until the wheat or other crop is ripe for harvest, then cut and carry it away, and sell it. He need not, however, wait, unless required to do so by statute, but may sell before the crop is matured or severed from the ground. Where growing corn is sold, it need not be removed by the purchaser until it is ripe. If left, it will not be liable to distress for rent (where distress is allowed), unless it is left for an unreasonable time. A purchaser on execution of a growing crop, raised annually by labor and cultivation, acquires the right and interest of the defendant in execution to the crop, with the right of ingress, egress, and regress, for the purpose of cutting and carrying it away. The purchaser may lawfully enter and remove the crop, provided it belonged, when sold, to the defendant in execution, although the land on which it was growing, and the crops, were held fraudulently by another person. He does not become a trespasser thereby; nor, by entering with the sheriff

to levy and sell, nor by purchasing at the sale." It is due the learned and lamented author of the work from which these sentences are taken (Gwynne on Sheriffs, 220, 221), to keep in mind the subject of his treatise. For the purpose of a levy, growing wheat is certainly, always a chattel; and there is no want of accuracy in what he has said, when his object and meaning are considered in the construction of his language. As we shall presently see, however, the rule is not quite as he has given it.

The language of C. J. Lane, in *Cassilly v. Rhodes*, 12 Ohio, 95, does not, at first, appear to clash with that just cited. He says: "If the question were between the grantor and grantee, whether growing crops, annual or other, pass by a deed of sale, it would be of easy solution. They are not, technically, 'emblemments,' but, 'issues,' or 'profits,' and part of the land, while in the owner's hands; and, unless excepted, pass by the deed, because it is construed most strongly against him who makes it." But his citation of authorities, 9 Cow. 39, 15 Mass. 159, would furnish a construction of his words such as would, if it must prevail, require a large modification of Mr. Gwynne's language. *The latter writer [444 says: "Wheat growing is a chattel." C. J. Lane calls it a "part of the land while in the owner's hands." The true rule is not fully given by either. To Mr. Gwynne's rule, as well as to that of C. J. Lane, qualifications are to be annexed. Wheat growing is not always a chattel; nor even while the lands whereon it grows are held by the owner, is it always a part of the land. No question of reservation by parol was involved, or attempted to be raised in 12 Ohio. We are not called upon to overrule any decision, in saying, as we do, that growing corn, or the like, may sometimes be a mere chattel, though not always so, and on the other hand, may be such mere chattel, although unsevered from the lands, while the latter are in the hands of the owner himself.

Thus regarding the legal character of growing corn, or the like, we feel authorized to declare, that a parol reservation of it may be proven, notwithstanding a subsequent deed between the same parties, in the common form. And in so declaring, we make no departure from the wholesome rule of evidence, which gives so much respect to the solemn, written contracts of parties.

A deed purports to convey the realty? But what is the realty? Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed,

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either by words or their behavior, signify their understanding, that as between them it is personalty, the law will so regard it, and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what in some instances would go with the lands as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect.

There was no error in admitting the evidence objected to in this case.

The motion for new trial will be overruled, and judgment given for the defendant.

445] *HUNTINGTON & MCINTYRE v. W. M. FINCH & Co.

The discretionary control of the court of common pleas over its own orders and judgments, during the term at which they are entered, ends with the term; and the power of the court to set aside or vacate its judgments, subsequent to the judgment term, is governed by settled principles, to which the action of the court must conform, and for a departure from which a judgment or order of the court may be subject to reversal on proceedings in error.

A judgment may be set aside on motion, at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered. And, in a proceeding of this kind, the court exercises an equitable jurisdiction, and should not vacate a judgment or order against the right and justice of the case.

The doctrine that a material alteration in a deed, or contract in writing, beneficial to the holder, or party making the alteration, will vitiate the instrument, is founded on a presumption of fraud; and the alteration, to have such effect, must be such as to effect some change in the meaning or legal operation of the instrument.

Where such alteration appearing on an instrument is not peculiarly suspicious, and beneficial to the person seeking to enforce it, the alterations will be presumed to have been made either before the execution of the paper or by the agreement of the parties afterward.

The erasure of the name of a surety on a promissory note, or bill of exchange, by agreement between the surety and the payee, is not such an alteration as will invalidate the instrument as against the principal.

A warrant of attorney to confess a judgment executed by the principal and surety on a note or bill, although in its terms authorizing a joint judgment against principal and surety, may be a good power to take a judgment against the principal alone.

Huntington & McIntyre v. Finch & Co.

PETITION in error to reverse the judgment of the district court of Franklin county.

It appears that the court of common pleas of Franklin county, at the January term, 1852, on motion, set aside a judgment of said court in favor of W. M. Finch & Co., against Horace F. Huntington and Thomas McIntyre, for \$1,003.33, and costs, taken by confession at the November term of said court, 1851. Finch & Co. excepted to the ruling of the court of common pleas in setting aside the judgment, and carried the case by petition in error to the district court of Franklin county; and the district court, at *the September [446 term thereof, 1853, reversed the order of the court of common pleas setting aside the judgment. And this petition in error is instituted to reverse this judgment of the district court.

It appears from the bill of exceptions, that in November, 1851, Finch & Co. held a bill of exchange for \$1,000 on J. Stevenson & Co., Portsmouth, Ohio, accompanied by a warrant of attorney to confess a judgment, and signed by Huntington & McIntyre, Thomas McIntyre, and H. Cowles & Co.

This bill of exchange having been protested for non-payment, and placed in the hands of Elijah Backus, Esq., for collection, H. Cowles & Co., a firm composed of Havens Cowles and Isaac N. Whiting whose liability on the bill was that of surety, were called upon by the attorney for payment; whereupon they gave an obligation in their individual names acknowledging their indebtedness to Finch & Co. for the amount, accompanied by a warrant of attorney to confess a judgment, and a stipulation for delay of payment by stay of execution. At the time of giving this separate obligation, Cowles insisted on having the name of H. Cowles & Co. erased on the bill of exchange; and in compliance with the wishes of Cowles, Backus, the attorney for Finch & Co., allowed the name to be erased on the bill, by drawing a pen over it. On the day on which the new obligation was given by Cowles and Whiting, a judgment was taken thereon, by confession, in favor of Finch & Co., against Cowles and Whiting, and also another judgment in favor of the same party, against Huntington & McIntyre, on the bill of exchange, both judgments being taken in the court of common pleas of Franklin county. The judgment against Huntington & McIntyre was taken on the confession of B. F. Martin, Esq., acting under the authority of the warrant of attorney for that purpose. Cowles and Whiting having been compelled to pay the judgments against them, and claiming,

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as the sureties of Huntington & McIntyre, to be subrogated to the 447] rights of Finch & Co. in the judgment *against Huntington & McIntyre, caused execution to be issued on that judgment, which was levied on certain real estate as the property of Huntington. At the March term of said court of common pleas, said Huntington, and one Harlow Roys, claiming to be a purchaser of the real estate levied on from Huntington, appeared and made the motion on which the order was made setting aside the judgment against Huntington & McIntyre, which was reversed by the district court.

S. Brush, and Swayne & Baber, for plaintiff in error.

P. B. Wilcox, for defendant in error.

BARTLEY, J. It is insisted on the part of the plaintiff in error that the district court erred in reversing the order of the court of common pleas setting aside the judgment taken by confession upon the following grounds, to wit:

1. That the setting aside of the judgment in the common pleas was a mere matter of discretion with that court.

2. That both the bill and the warrant of attorney to confess judgment had been invalidated by the erasure of the name of H. Cowles & Co., without the consent of Huntington & McIntyre.

3. That the judgment taken was not in strict conformity to the power to make the confession.

I. If the order setting aside the judgment in the common pleas rested in the discretion of the court, it was not subject to reversal on petition in error. The court of common pleas has ample control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court. And the power of the court to set aside or vacate its judgments, subsequent to the judgment term, is governed by settled principles to which the action of the court must conform, and for a departure from which any judgment or order may be subject to be reviewed and reversed on proceedings in error.

448] *It is well settled in this state that a judgment may be vacated or set aside on motion, at a term subsequent to the judgment term, for *irregularity* or *improper conduct* in procuring it to be entered. And this has become one of the accustomed and settled remedies for relief against judgments wrongfully obtained, where

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the impropriety or irregularity has not been superinduced by the fault or negligence of the judgment debtor. *McKee v. The Bank of Mount Pleasant*, 7 Ohio, 188.

The order of the common pleas, setting aside the judgment under consideration in this case, was therefore subject to reversal on petition in error in the district court, if proper ground existed for such proceeding.

II. Was the instrument, on which the judgment was taken, vitiated by the erasure of the name of H. Cowles & Co.? This paper is as follows:

"\$1,000.

COLUMBUS, O., November 13, 1851.

"Thirty days after date, pay to the order of W. M. Finch & Co., at the office of J. Stevenson & Co., the sum of one thousand dollars, for value received—and we dispense with the proof of demand of payment, protest, and notice of non-payment of the above bill of exchange, and authorize any attorney at law to appear for us and in our names, at any time after the maturity of the same, in any court of record of the State of Ohio, and waive the issue and service of process, and confess judgment in favor of the payee thereof, for the amount of the bill and interest, and the damages allowed by law on protested bills of exchange, drawn on any person, or persons, or body corporate, within the jurisdiction of the United States and without the jurisdiction of the State of Ohio, together with the costs of suit—to release all error and writs of error in law or equity.

"Witness our hands and seals this 13th day of November, A. D. 1851.

(Signed,)

"HUNTINGTON & MCINTYRE.

[SEAL.]

"THOS. MCINTYRE.

[SEAL.]

"H. COWLES & Co. (erased.)

[SEAL.]

"To J. STEVENSON & Co., Portsmouth, Ohio."

It appears that Huntington & McIntyre were principals on this instrument; that the name of the firm of Huntington & McIntyre, which was composed of Horace F. Huntington and Thomas McIntyre, was written by Huntington, below which McIntyre placed his individual signature; and that the name of H. Cowles & Co. was placed on the paper *last, and as surety for Huntington & McIntyre. After the maturity of the paper, when Cowles & Co. were urged to pay the debt, they obtained some delay for themselves by an agreement to stay execution, on giving a separate cognovit, signed by Cowles and Whiting, individually. And when this separate cognovit was given for the debt, the name of H.

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Cowles & Co. was erased from the first paper at the request of Cowles, and with the consent of the creditor; but it does not appear that Huntington & McIntyre, at that time, either knew of, or assented to the erasure. How could this erasure invalidate the instrument? There was clearly no fraud in the transaction. And it would be difficult to perceive how Huntington & McIntyre could be prejudiced by being relieved of the security on their paper by the consent of the holder.

It is true, that it appears to be a settled rule of law, that any material alteration in a deed, promissory note, or bill of exchange, beneficial to the holder, or party making the alteration, will vitiate the instrument. This doctrine, however, is founded on a presumption of fraud; and the alteration must be such as to effect some change in the meaning or legal operation of the instrument. And the adjudications have not been uniform on the point, whether the burden of explaining an alteration apparent on an instrument devolved upon the holder, or the party sought to be charged. The rule, however, established by the greater weight of authority, both in England and in this country, appears to be, that where the alteration is *suspicious* and *beneficial* to the holder of the paper, the party seeking to enforce it is required to explain it before he can recover; but where the alteration is not peculiarly suspicious and beneficial to the holder, the alteration will be presumed to have been made either before the execution of the paper or by the consent of the parties. 11 Conn. 531; 2 Barb. Ch. 119; 7 Barb. S. C. 564.

It appears, however, that in the case before us, the circumstances [450] explanatory of the alteration, were fully before the *court of common pleas on the motion to set aside the judgment, and that the erasure of the name of the security on the paper was not *beneficial* to the holder, and that it was in fact his permission, at the request of the security. And as the principals could not be prejudiced by taking the name of their security from their paper, under the circumstances, and could not be allowed to object to it, we are unanimous in the opinion that the obligation upon which the judgment was taken was not invalidated by the erasure. The operation of a rule should never be extended beyond the reason of it. When all presumption of fraud was repelled by explanatory evidence, and it was shown that the alteration was made by the consent of the only parties to the instrument whose interests could be in any manner affected by it, the reason for the application of the rule, that a writ-

ten contract may be vitiated by an alteration, was wholly removed. The liability of a surety is not an independent or joint liability, but accessory to that of principal; and the beneficiary of his obligation is the creditor and not the principal. Where, therefore, the creditor allows the surety on an instrument to be discharged, the principal, from the very nature of the relation between him and the surety, would not be allowed to interpose an objection. For, so far as he is concerned, the alteration is wholly immaterial. We are sustained in this view by the adjudication in the case of *Broughton v. West*, 8 Ga. 248, where it was held that the erasure of the name of a surety on a promissory note, by agreement between the surety and the payee, is not such an alteration as will invalidate the note as against the principal.

III. It is insisted, however, on the part of the defendants in error, that if the alteration did not invalidate the obligation of the principals to the instrument, yet, that the power to take the judgment by confession, was a power to take a joint judgment against the principals and surety; and that as a power of this kind must be strictly pursued, the erasure of the name of the surety from the instrument, which embodied both the obligation and the [451 warrant of attorney, destroyed the power to take the judgment by confession. It is not necessary to stop here to inquire whether there was anything essential in the nature, or express in the terms of the power, requiring a joint judgment against the principals and surety on this instrument. It is a sufficient answer to this objection, to say, that on a motion to set aside a judgment, the court exercises an equitable jurisdiction, and will not vacate a judgment against the manifest right and justice of the case. It appeared on this motion in the court of common pleas, that the defendants in error had given the holder of the instrument a power to take a judgment against them by confession. And even if, by its terms, it were an authority to take a joint judgment against them and their surety, yet they were in nowise prejudiced by the judgment having been taken against them alone without the surety. A power to take a judgment against a principal and his surety, although by its terms authorizing a joint judgment, would seem, upon sound reason, to be authority to take a judgment against the principal alone. The provision authorizing a joint judgment, might be insisted on, and enforced by the holder of the power, but as far as the principal to the instrument is concerned, it is wholly immaterial.

What face did the defendants in error in this case present on their motion to set aside this judgment in a court exercising an equitable jurisdiction in such proceeding? They did not deny that H. Cowles & Co. was a mere surety on their paper. And although the name of Cowles & Co. had been erased from the instrument, yet they could not even complain that the surety had been discharged from the payment of their debt, for a separate *cegnovit* had been given by the surety for the same liability at the time of the erasure. They could not complain that any advantage had been given to their surety over them, because a judgment was authorized against the surety, and afterward actually taken on the same day on which the judgment had been entered up against themselves. And they could not complain that efforts were made to make them pay their 452] own debt before *the enforcement of the liability against their surety, because their surety had, in fact, been previously compelled to pay the debt.

But it is insisted that even if they were in nowise prejudiced, yet the power to take the judgment by confession, was authority to take a joint judgment, and that it was not strictly pursued. It has been frequently adjudged, that a warrant of attorney to take a judgment by confession, by one of several partners signing the partnership name, thereby expressly showing an intention to authorize a joint judgment against several persons equally liable, would be a good power to take a judgment against the person individually giving the warrant, although not binding on the other members of the firm. And there are numerous instances to be found in the reported decisions, both in England and in this country, where a power to take a joint judgment by confession by several persons, but which was either void or voidable as to part of the persons signing it, was held good as to the other parties. Where the relation of principal and surety exists, the obligation of the latter of which is merely accessory to that of the principal, and is governed by equitable principles, there would seem to be no good and substantial reason that would enable a principal to avoid the power because the creditor did not enforce it jointly with his surety. It would seem that a power to take a judgment by confession, in the hands of a creditor, against a principal and surety jointly, would be a good authority to take a judgment against the principal alone.

And as the court of common pleas on the motion to set aside the judgment, exercised an equitable jurisdiction, and should not have

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vacated the judgment against the right and justice of the case, the majority of this court are clear in the opinion, that the common pleas erred in this respect, and that the ruling of the district court reversing the order of the common pleas, was correct.

The judgment of district court affirmed.

RANNEY and WARDEN, JJ., dissented.

*RICHARD STEVENS v. THE STATE OF OHIO. [453

The constitution confers no jurisdiction whatever upon the court of common pleas, in either civil or criminal cases.

It is made capable of receiving jurisdiction in all such cases, but can exercise none, until conferred by law.

The act of May 1, 1854, to abolish the criminal court in Hamilton county, and to transfer its unfinished business to the court of common pleas in the first district, has conferred the same criminal jurisdiction upon that court as is conferred by law upon the courts of common pleas in other counties of the state.

And this, without regard to the question, whether the act is available to abolish the criminal court, and to vacate the office of its judge.

Parts of an enactment, when capable of separation, may be valid and effectual, when other parts may be void, by reason of this repugnancy to a constitutional provision.

This act gives the common pleas no power over the process of the criminal court, and no right to employ the grand jury summoned for that court.

An indictment found in the common pleas, by such a grand jury, is illegal, and a plea in abatement for that cause sufficient.

ERROR to the common pleas of Hamilton county.

The facts and questions sufficiently appear in the opinion of the court.

D. P. Lowe and Warner M. Bateman, for plaintiff in error.

No argument was presented on behalf of the state.

RANNEY, J., delivered the opinion of the court.

At the January term, 1855, of the court of common pleas for Hamilton county, the plaintiff in error was convicted of the crime

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of maliciously stabbing one John Morris, and sentenced to imprisonment in the penitentiary for the period of one year. Without particularly adverting to the complicated pleadings, filed in the court below, it is enough to state that they are sufficient to present the two propositions now relied upon to reverse the judgment:

1. That the court had no jurisdiction of the case; and 2. That the indictment was not found by a properly constituted grand jury.

454] *I. Had the court jurisdiction? Counsel in argument have made the answer to this question depend wholly upon the constitutionality of the act of May 1, 1854, "to abolish the criminal court in the county of Hamilton, and to transfer the unfinished business of said court to the court of common pleas in the first district." 52 Ohio L. 107. Aside from certain objections, which seem to have been taken under a mistake of the facts, they insist that the act is void, because it has the effect, without having obtained the concurrence of two-thirds of the members elected to each branch of the general assembly, of diminishing the number of the judges in the first judicial district, and of vacating the office of the judge of the criminal court; and that in these particulars it is inconsistent with the fifteenth section of the fourth article of the constitution.

We do not agree with counsel, that the solution of these questions is necessarily involved in the decision of this case; and without a necessity for doing so, we do not consider it proper to express an opinion upon them, until those immediately interested shall, if they desire it, have been fully heard. Whether this section of the constitution extends to any other courts than those named in and created by the constitution itself, or not; or whether the criminal court is or is not abolished, and the judge thereof, in or out of office, seems to us in no way decisive of the question, whether the court of common pleas in that county has been invested with jurisdiction over the crime of which the plaintiff in error stands convicted. The existence of the criminal court, and even the exercise of its former jurisdiction, interposes no obstacle to investing the court of common pleas with jurisdiction over the same class of cases; while, on the other hand, the effectual abolition of the former would not authorize the latter to exercise such jurisdiction without legislative authority; the constitution, article four, section four, expressly providing that "the jurisdiction of the

courts of common pleas, and of the judges thereof, shall be fixed by law."

*The constitution itself confers no jurisdiction whatever [455 upon that court either in civil or criminal cases. It is given a capacity to receive jurisdiction in all such cases, but it can exercise none until "fixed by law."

By the fifth section of the act to create a court of criminal jurisdiction in Hamilton county (50 Ohio L. 90), the court thereby created was invested with jurisdiction over crimes to the same extent and in the same manner as the courts of common pleas in other counties of the state; and the jurisdiction of the court of common pleas in that county was, to the same extent, taken away; and it continued deprived of this jurisdiction down to the passage of the act in question, when it was restored; the second section providing that "the said court shall have such powers and jurisdiction in criminal matters, in the county of Hamilton, as are conferred by law upon the court of common pleas in other counties in this state." This act was intended to accomplish two distinct purposes: first, the abolition of the criminal court, and the transfer of its unfinished business to the court of common pleas; and second, to confer upon the last-named court the requisite jurisdiction, not only to try and determine such unfinished business, but in the future to exercise the same powers in criminal cases as were exercised by the same court in other counties of the state. Now, suppose the first of these objects to have failed, what possible effect could that have upon the last? No constitutional impediment existed to effecting the last by an ordinary act of legislation, and if it had stood alone, no one would have doubted that it had been effectually accomplished. But no principle is better settled or supported by strong reasons than that which gives effect to the valid parts of an enactment, when capable of separation, although other parts of the same law may be invalid, by reason of their repugnancy to a constitutional provision. This principle has been several times recognized by this court, and is one of familiar application in the courts of our sister states and of the Union. It may be admitted that the motive for restoring this jurisdiction to *the [456 common pleas had its origin in the supposition that the criminal court was at the same time and by the same act abolished. But it is now entirely immaterial what might have been the inducements that led to the enactment, or how grossly mistaken the gen-

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eral assembly, may have been. So far as it is not in conflict with the constitution it is a law of the land; and, as a law of the land, we have no discretion to refuse its enforcement.

Without, therefore, expressing any opinion as to the validity of that part of the act which assumes to abolish the criminal court, or to vacate the office of its judge, we entertain no doubt that other parts of it have effectually conferred jurisdiction upon the court of common pleas over the crime of which the plaintiff in error has been convicted; and that to this extent at least, that act is open to no valid constitutional objection.

II. But while we are clear in the opinion that the court decided correctly in overruling the pleas to the jurisdiction, we are equally clear that the indictment was not found by a legally constituted grand jury, and that the court erred in making the same disposition of the pleas in abatement. To protect the citizen from unfounded accusations, the laws of this state have always guarded with scrupulous care the selection, return, and impaneling of the grand jury; and any substantial departure from the provisions of the statutes has always been held a good cause for quashing the indictment. *Doyle v. The State*, 17 Ohio, 222. The third section of the act conferring criminal jurisdiction upon the court, provides the manner in which it is to be supplied with a grand and petit jury. At least fifteen days prior to the first Monday in every month, the clerk is required to draw from the jury-box the names of twenty-seven jurors, the first fifteen of whom are to be summoned to serve as grand jurors, and the remaining twelve, as petit jurors, for the trial of criminal cases; their terms of service to commence on the first Monday of the next succeeding month.

This act took effect on the first day of January, 1855; and on 457] that day *the court commenced the session, at which the present indictment was found. Now, it was plainly impossible to obtain a jury, in the manner required by this act, for that term of the court. Before the law took effect, the clerk had no power to draw the jury, and after it did take effect, it was too late to do so for that term. The consequence was, that no indictment could be legally found until the February term; and that by a jury drawn and summoned in January.

But the court, instead of waiting until, by the terms of the law, it could enter upon the exercise of this part of its jurisdiction, ordered the venire issued from the criminal court, to be returned into

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the common pleas, and brought in by attachment the persons summoned to serve in the former court, and compelled them to serve in the latter. This was clearly irregular, and wholly unauthorized. There is not a word in the law that gives the common pleas any power whatever over the process of the criminal court. The jury thus obtained was the jury of the criminal court, and could legally exercise its functions there and nowhere else. The common pleas had no rightful power over it, and its acts in that court were wholly inoperative and illegal.

For this error the judgment is reversed, and the cause remanded for such other and further proceedings against the plaintiff in error as may be consistent with the foregoing opinion, and in accordance with law.

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A demurrer will be sustained to a bill in chancery on the ground that the subject of the suit is too trivial to justify the resort to equity.

RESERVED in Hamilton county.

Oliver, for complainant.

Coffin & Mitchell, for defendant.

PER CURIAM. This is a bill in chancery to collect the amount due upon three bank bills, issued by the Lebanon *Miami [458 Banking Company, for the payment, in the aggregate, of the sum of five dollars. It is founded upon the idea that the defendants, who were stockholders in the bank when the bills were issued, are individually liable for its debts. This liability is not deduced from any independent contract by which they undertook to pay the debts, for no such contract is alleged. Nor does it rest upon the ground that they have received the assets of the corporation which were bound for its liabilities, for no such fact is stated. Nor is it pretended that there is, in the charter of the bank, any provision, that, either expressly or by necessary implication, makes its stockholders personally responsible. It is upon neither of these grounds that relief is sought. The ground upon which we are asked to sustain the bill is, that stockholders in a corporation are individu-

ally liable for its debts, unless, by some provision of the charter or statute law, they are exempted from such responsibility. The counsel for the complainant admits that Blackstone, and divers other eminent writers upon the law, and also certain courts, have entertained a contrary opinion; but he is very clear they were all wrong, and he hopes and thinks this court will not be governed by such loose and inconsiderate expressions, either of text-writers or judges.

After a careful consideration of the elaborate and learned argument of counsel, we are unable to perceive that he has established the liability of the defendants. We suppose that no law is better settled than that they are not liable.

Again, the subject of this suit is too trivial. Speaking of the objections to a bill that may be taken by demurrer, Story says: "One of the objections, which may thus be taken, is, that the value of the subject of the suit is too trivial to justify the court in taking cognizance of it; or, as the phrase usually is, that the suit is unworthy of the dignity of the court. The true ground of this objection is, that the entertainment of suits of small value has a tendency not only to promote expensive and mischievous litigation, but also to consume the time of the court in unimportant and 459] *frivolous controversies, to the manifest injury of other suitors, and to the subversion of the public policy of the land. Courts of equity sit to administer justice in matters of grave interest to the parties, and not to gratify their passions, or their curiosity, or their spirit of vexatious litigation. In England, the rule of the courts of equity is, not to entertain a bill under the value of ten pounds sterling, or forty shillings *per annum* in land, except in special cases, such as in cases of charity, in cases of fraud, and in cases of bills to establish a right of a permanent and valuable nature. Story's Eq. Pl., sec. 508.

This rule, which Story says is of great antiquity, has always prevailed in Ohio, with this modification, that, as our statute allows an injunction bill to restrain proceedings at law where the matter in dispute is of the value of twenty dollars (Swan's Stat., old ed., 710, sec. 42), our courts of equity, by analogy, have generally entertained bills, though not for injunctions, if their subject-matter was of that value.

For the reasons stated, the demurrer to the bill must be sustained, and the bill dismissed.

**RICHARD BATES v. WILLIAM LEWIS, TRUSTEE OF THE MECHANICS
AND TRADERS' BANK OF CINCINNATI.**

The constitutionality of the act of 1845, "to authorize William Lewis, trustee of the Mechanics and Traders' Bank of Cincinnati, to commence and prosecute suits against the debtors of said bank" (43 Ohio L. L. 308), so far as that authorizes suits against parties to notes, etc., given to said bank, and against delinquent stockholders, as well as in the prohibition it contains against the defendants setting up the nullity of such evidences of indebtedness, is no longer an open question.

The fact that the note sued on was given for stock, subscribed without any intention to pay it, merely for the purpose of pretending to the public that the stock was greater than it really was, or for the purpose of preventing the predominance of certain stockholders, is no defense to the action of the trustee.

Nor, under the common notice of set-off, could the defendant on such an action be allowed to set off against the claim the amount paid by him since the commencement of the action, under execution on a judgment rendered against him and others, as partners in said Mechanics and Traders' Bank.

***ERROR to the Superior Court of Cincinnati; reserved in [460
Hamilton county.**

The case is stated in the opinion of the court.

Taft, Mallon & Corwine, for plaintiff in error.

Fox & Lincoln, and *James*, for defendant in error.

WARDEN, J. The action in the court below was brought under the provisions of "an act to authorize William Lewis, trustee of the Mechanics and Traders' Bank of Cincinnati, to commence and prosecute suits against the debtors of said bank." 43 Ohio L. L. 308.

A note for \$1,500, dated September 28, 1839, made by Bates, and payable at the M. & T. Bank three months after date, "to the order of Thomas Moodie, cashier *pro tem*," was the evidence of indebtedness counted on by the plaintiff. The plea was the general issue, with the common notice of set-off.

The intervention of a jury being waived, and the premises submitted to the court below, a copy of the note declared on was put in evidence (the original being lost, as shown by the proof). The articles of association having likewise been put in evidence, the

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defendant below objected to the note on the ground that the said Mechanics and Traders' Bank of Cincinnati was a bank not incorporated by law when said note was executed, and that said note was by law absolutely void; and the plaintiff in error now insists, on this ground, that the court below erred in giving judgment on the note.

In the course of the evidence, it appeared that Bates was a stockholder and director of the bank, and that the note sued on was given for what the witnesses designate as nominal stock, being an additional subscription intended, as some witnesses say, to show that there was a considerable amount of stock taken, or, as others have it, to have the effect of preventing certain persons from getting control of the bank, but certainly not intended to be paid. The facts as to the assignment to Lewis were proven so as to bring 461] *the case under the provisions of the act, so far as relates to the right of Lewis to sue in his own name.

We can not treat the question whether the act of 1845 is or is not constitutional, so far as it gives a right of action on a note like the present, as open to discussion in this court. A series of decisions, pronounced upon this enactment, and others of like character, has fully established its constitutionality. See *Trustees of Cuyahoga Falls R. E. Ass'n v. McCaughey*, 2 Ohio St. 152, and cases there cited. We have no disposition to disturb those decisions. Whether the act before us undertook to make valid what an earlier law had declared void, or (as is, I think, a better expression of its character and objects) merely made a new rule of *estoppel* for the benefit of creditors, its provisions were in strict harmony with public justice. In the language of Hitchcock, J., "it violates no contract. Its very object is that contracts may be enforced." *Lewis, Trustee, etc., v. McElvain*, 16 Ohio, 355.

Nor can the authority of the trustee to sue stockholders be longer questioned. The case last cited upholds the law in this as well as the former particular.

Was the understanding that the note was given for sham stock sufficient to avoid it in the action brought by Lewis?

The testimony was in substance as follows:

Dr. Lakey says: In 1839 nominal stock was made at the instance of Surtees, the cashier, who afterward absconded, and who said the money for the nominal stock was not expected to be called for, and

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was intended to show that there was a considerable amount of stock taken.

Patrick Codey says the object was to control Surtees.

So says John Y. Armstrong.

Stanhope S. Rowe says it was to prevent John H. James from obtaining the control of the bank.

All agree that the stock was never to be paid.

Now it matters not whether the object of defrauding the public by the pretense of a large subscription of stock, or the purpose of preventing the predominance of certain *stockholders, induced the [462 making of this nominal stock. As partners in an association doing an unlawful banking business, these men can not be released from a subscription which may have induced creditors to trust the bank.

Under an act which, as has already been declared, is designed to operate in favor of the creditors of this bank, we must hold the plaintiff in error to his liability on this note. True, it was meant to be, at the same time, a fact and a fiction; a fact so far, perhaps, as to enable the defendant and others to control the bank—a fiction so far as to become a nullity in the day of payment. In law, however, it must be treated as not a fiction, but a fact, warranting the judgment which we are asked to reverse. To allow the private understanding of these holders of what is termed the "nominal stock" to take from the creditors what enabled those fictitious stockholders to extend and control the operations of the bank, would be a mockery of justice and a disregard of the chief purpose of the statute we have declared to be constitutional.

A single question remains.

The defendant below claimed the right to set off \$300, paid by Bates since the commencement of this suit, on an execution against him and others on a judgment rendered in favor of the State Bank of Missouri, against Bates and others, as partners in said Mechanics and Traders' Bank.

The set-off was not allowed by the Superior Court, and judgment was given against Bates for the full face of the note and interest.

The right to set off the \$300 was rightly denied. The object of the act of 1845 was not to change the ordinary rules of set-off, or to provide for the settlement of the partnership concerns of the so-called stockholders in the suits for which it provided as suits at law. The statute contemplates, indeed, not only law, but chancery proceedings, to recover the several amounts of indebtedness to the

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bank ; but it enables the trustee to bring one or several suits, and to proceed either at law or in chancery, according to what would *have been the rights of the association if it had been incor- [463 porated, so far, at least, as rights of set-off or contribution are concerned. Since, therefore, the right of set-off would, in any other action at law (at least under the common notice filed with the general issue) be limited to matters in existence at the time of suit brought, we must not extend it in this case to claims subsequently arising.

Judgment affirmed.

ROBERT W. MCCOY ET AL. v. WILLIAM GRANDY ET AL.

The statute for the relief of occupying claimants, passed March 10, 1831, requiring the value of the permanent improvements of the *bona fide* occupant, under color of title, to be paid as a condition precedent to the entry and possession of the owner, although an encroachment on the rights of private property as settled by the common law, rests upon a strong equity in favor of a compensation for improvements, which have augmented the value of the land, and inured to the benefit of the owner.

The option which the law gives to the owner of land, after a recovery in ejectment, either to take the land on paying for the improvements, or to take the amount of its value in money without the improvements, secures to the owner the property in the land, and at the same time protects the occupying claimant in his equitable claim to a compensation for his improvements.

But the amendatory act of 1849, giving to the *occupying claimant* the option which the original act gave to the *owner* of the land, thus taking the property away from the owner after the solemn form of a recovery and judgment in ejectment, and transferring it to his unsuccessful adversary, who is ordered to be ejected as an intruder on the land, is a palpable invasion of the right of private property.

In case of a mortgage, a judgment lien, a levy under an execution, assessment of a tax, or other incumbrance on land arising out of the owner's liabilities, it is not within the scope of the legislative power to take the fee in the land from the owner, and transfer it absolutely to the person holding the claim, while the owner stands ready and insists on discharging the liability and saving his property.

The competency of the legislative power to transfer the property of one person to another, without the *consent* of the former, is not shown by any analogy, either to proceedings in partition, or the bar of the statute of limitations. In the case of the former, although the right of partition is an incident to

464] the estate of tenancy in common, and the division the result of *ne-
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cessity, yet the owner is not divested of his property, without the opportunity of saving it by a purchase; and in the case of the latter, the bar of the statute rests upon a rule of evidence raising a presumption that the title has passed, and upon this ground the aid of the judicial power is denied to one who has slept too long on his rights.

The occupying-claimant law rests upon entirely different ground; and in securing to the occupant a compensation for his improvements, as a condition precedent to the restitution of the property to the owner, it goes to the utmost stretch of the legislative power touching the subject. And the amendatory act of 1849, providing for the transfer of the land to the occupying claimant without the *consent* of the owner, is in plain conflict with the 19th section of the first article of the constitution, which declares that "*private property shall ever be held inviolate*," etc., and is, therefore, by the unanimous opinion of the court, pronounced unconstitutional and void.

WRIT of certiorari to the court of common pleas.

Reserved in the district court of Morrow county for decision by the Supreme Court.

The plaintiffs recovered in the common pleas in an action of ejectment on their title to certain lands in the county of Morrow; whereupon the defendants made application to the court for the benefit of the law for the relief of occupying claimants; which being ordered, the defendants elected to retain the land, and to pay to the plaintiffs a sum of money equal to the value of the lands in a state of nature, pursuant to the provisions of the amendatory act for the relief of occupying claimants of land, passed March 22, 1849. Thereupon proceedings were duly had and reported to the court for the valuation of the improvements on said lands, and also the valuation of the lands without the improvements. The plaintiffs objected to the defendants being allowed to elect to take the land on the paying the amount of the value thereof, without the improvements, but elected themselves to pay the defendants the amount of the value of their improvements and moved the court for an order for that purpose. The court overruled the motion, and allowed and confirmed the election of the defendants to retain the lands, and ordered that upon their paying to the plaintiffs, or depositing with the clerk of the court for that purpose, *the amount of the valuation of the lands, without [465 the improvements, all the proceedings under the recovery in ejectment should be stayed; and also that the plaintiffs pay the costs on the proceedings for the benefit of the law for the relief of occupying claimants. The plaintiffs excepted to this ruling of the court,

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and now prosecute this writ of certiorari, to reverse these proceedings of the court below.

Swayne & Baber, attorneys for plaintiffs.

Powell & Buck, attorneys for defendants.

BARTLEY, J. The main question presented in this case is whether the act of the 22d of March, 1849, amendatory to the act for the relief of occupying claimants, which gives to the occupying claimant, instead of the owner of the land, after a recovery in ejectment, the *option* either to take the land and pay the amount of the valuation without the improvements, or to take pay for his improvements, is constitutional?

The first and second sections of this law are as follows:

"SEC. 1. That the occupying claimant of land, holding by any such title, in such manner as is pointed out in the act for the relief of occupying claimants of land, passed March 10, 1831, of which this is amendatory, shall, after judgment rendered against him, and in favor of the successful claimant, have an option to demand payment from said successful claimant, of the full value of his lasting and valuable improvements made on the land in controversy, before the commencement of the suit, or to pay to the successful claimant the value of the land, without the improvements thereon, at his discretion.

"SEC. 2. That if said occupying claimant shall elect to retain the land, he may tender to the successful claimant a sum of money equal to the value of the land in a state of nature; or, if he shall elect to receive payment for his improvements, the successful claimant may tender to him a sum of money equal to the value of his improvements; but if such tender shall, in either case, be refused, unless the jury impaneled under the provisions of the third section of the said before-mentioned act, shall assess a larger sum in favor of the party so refusing than the amount tendered, exclusive of interest from the time of the tender, the party refusing shall pay the full costs of the proceeding. But if the jury shall assess a greater sum than the amount so tendered, exclusive of interest, the party making the insufficient tender shall pay the costs, for which, if necessary, judgment may be rendered and execution issued as in other cases."

466] *The original act, to which this is amendatory, gives to the real owner of the land the election to pay the occupying claimant

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for his improvements and take the land, or to receive the amount of the valuation of his land in money, and give up his title.

The constitutionality of a law of *this* kind was contested for some years. The Supreme Court of the United States, in the case of *Green v. Biddle*, 8 Wheat. 1, determined that the occupying-claimant law of Kentucky, of 1812, was unconstitutional. This decision, however, was placed on the ground that the law impaired the obligation of the compact between Kentucky and Virginia, relative to lands in the former state. The same court, in the case of the *Bank of Hamilton v. Dudley's Lessee*, 1 Pet. 492, in which the statute of Ohio for the relief of occupying claimants came under review, conceded the legislative power of the state to secure to a *bona fide* occupant of land a compensation for the value of his lasting improvements, and to authorize him to retain possession of the land he had improved until he shall have been paid that amount.

By the common law, improvements made on land are considered as annexed to the freehold, and pass with it; so that when the owner recovers in ejectment he is not subjected to the condition of paying for any improvements which may have been made upon the land by the occupant. Although the occupant may be in possession in good faith, under color of title, and a mistaken supposition that he has the title to the land, yet, as against the true owner, he is an intruder and wrong-doer. And it would seem that there is no moral obligation which would require a person to pay for improvements made upon his own land, which he never authorized, and which was originated in a tort. But the occupant of land, under color of a *bona fide* purchase, has a *strong equity* in favor of a compensation for his lasting improvements, which have *augmented* the value of the land. This equity arises from the *mistake* of the occupant, and the *neglect* of the owner, whereby the labor of the former has inured to the benefit of the latter. There are difficulties, however, [467 in sustaining this equitable claim consistently with the inviolability of private property. The improvements may be expensive, and beyond the ability of the owner to pay without a disposition of the land; besides, he may have a strong attachment for the property, and it might have answered all his purposes without the improvements.

To overcome these embarrassments, the learned French civilian, Pothier (see his *Traite du droit de Propriete*, No. 347), proposed

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that the owner should be allowed to take possession, upon the condition that the payment of the value of the improvements should remain a charge upon the land, to be made by installments, under the regulation of the court. It appears to be a rule of the civil law, that in a suit for the rents and profits, against the *bona fide* occupant, the value of his lasting improvements may be deducted from the amount of the plaintiff's claim for damages; and Lord Hardwicke is reported to have intimated, in the case of *Dormer v. Fortescue*, 3 Atk. 134, that the rule of the civil law would be adopted in England, and the occupant sued in an action for the mesne profits, be allowed the value of his improvements, by way of set-off. The original statute for the relief of occupying claimants, however, discarding all refinements arising out of the difficulties and embarrassments of the subject, requires the value of the permanent improvements of the *bona fide* occupant to be assessed and paid, as a condition precedent to the entry and possession of the owner. This encroachment upon the rights of private property, as settled by the common law, arose out of peculiar and pressing circumstances, produced by the liability to mistake, incident to the settlement of a wide extent of uncultivated land in a new country, where obscurity and uncertainty in land titles, by reason of conflicting locations, were unavoidable. This law was adjudged to be constitutional by the Supreme Court of this state, in the case of *Hunt v. McMahon*, 5 Ohio, 132, and its validity is not now an open question. The extent of this encroachment upon the common-law 468] rights of property is not to *divest the owner of his fee in the land without his consent. The right of the owner to his land is secured, and he has the right to its restitution on paying the amount which its value has been increased by means of the improvements made by the occupant under color of title, and a mistaken belief that he was the owner of the land himself. The *election* which is here given to the owner, either to take his land on paying for the improvements, or to take the amount of its value in money, without the improvements, secures to the owner his right to the land, and at the same time protects the occupant in his equitable claim to a compensation for his improvements. And this is the greatest extent to which legislation had ventured on this subject, until the amendatory act of the 22d of March, 1849, the validity of which is now called in question.

This amendatory act gives to the *occupying claimant* the option
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which the original act gave to the *owner* of the land; thus giving the land itself to the occupant, who is without title, and requiring the owner to surrender his title without his consent.

The 19th section of the first article of the constitution declares that "*private property shall ever be held inviolate, but subservient to the public welfare,*" etc.

Where, under this statute of 1849, the land is taken away from the owner, and given to the occupying claimant, it is not taken under any claim of subserviency to the "*public welfare.*" It is not taken, either, under any pretense of a forfeiture or penalty incurred by the owner. But after the solemn form of a recovery in an action of ejectment, after the owner's title has been duly established, and a judgment in ejectment formally entered in his favor, and against the occupant as an intruder, the same court, by virtue of this statute, is required to direct the land to be taken from the owner without his consent, and even against his protestations, and given to the occupant who, by the judgment of the court, has been ordered to be ejected for want of title.

*It is true that there are many instances wherein liens [469 may be acquired by one person on the lands of another without his consent, and under which the lands will be liable to be sold and taken from the owner. But in such instances the owner is at all times, before the sale, at liberty to come forward and save his land by discharging the liens. Under this amendment to the occupying-claimant laws, however, the owner of the land is not allowed the advantages which the law extends to a debtor whose property is under execution. However able and willing to pay the full value of the improvements put on his land without his authority, the owner is compelled to give up his land; and that, too, not at the price he may fix upon it, nor even at the price for which it might be sold at a public sale to the highest bidder, but at a price to be fixed by a jury. And in the case now before us, although the owners of the lands offered to pay to the occupant the full value of their improvements, and protested against the occupant being allowed to elect to take their lands, yet the occupying claimants were allowed by the court below to take the lands, and judgment was rendered against the owners for the costs of the proceedings under the occupying-claimant law.

It is claimed in the defense that the constitutional provision above recited applies only to property in which the owner has a

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distinct, perfect, and exclusive title, wholly unincumbered by the claims or interests of other persons, and coupled not only with the right of possession, but also with actual possession. This would give too limited an operation to that important safeguard which was designed to protect every person in his rights of private property. The shield of the constitution covers private property in every form and condition in which it may be found. In case of a mortgage, a judgment lien, a levy under an execution, or other incumbrances on land, arising out of the liability of the owner, it is not within the scope of the legislative power to take the fee of the land from the owner, and transfer it absolutely to the person holding the incumbrance, while the owner stands ready and insists upon discharging the liability, and saving his property.

It is said that the occupying claimants in this case held a tax title, under which they had occupied for many years, and thus acquired a joint interest in the lands with the owners by the payment of the taxes and making improvements on the land; and that the legislative authority gives a discretion in prescribing the mode of adjusting several distinct interests attaching to the same property.

It does not appear in this case under what kind of a claim the defendants were in the occupancy of the land; but if it did, the assumption of counsel for the defendants would be wholly unavailable. If the defendants had purchased the lands on a sale for the taxes, and acquired a title, they could hold the entire interest in the lands against the former owners for whose taxes they had been sold, and there would be no joint interest therein to adjust. But if the tax title were imperfect, they acquired no title as against the former owners, and therefore could take nothing by it. All that could be claimed upon an occupancy under a defective tax title would be a claim of good faith in the occupancy of another's lands, so as to lay a foundation for an equitable claim to compensation for improvements and the payment of taxes.

The competency of the legislative power to transfer the property of one person to another without the consent of the former, is argued from analogy to proceedings in partition, the statute of limitations, etc. The right of partition is incident to the estate of tenancy in common, and the division is the result of necessity. But in this instance the property of one tenant is not taken against his consent and transferred to another, without an opportunity af-

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forded him of saving his property by a purchase. The statute of limitations does not rest upon the authority to take the property of one person and transfer it to another, but upon a rule of evidence raising the presumption of a conveyance of title. By the policy of the law, lapse of time is made proof paramount *to [471 all other evidence that the title has passed, and the aid of the judicial power denied to a person who has slept upon his rights until there exists a rational presumption against his claim.

The occupying-claimant act is founded on no such ground as this; and in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, it goes to the utmost stretch of the legislative power touching this subject. And the statute of the 22d March, 1849, providing for the transfer of the fee in the land to the occupying claimant without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the constitution. This statute is, therefore, by the unanimous opinion of the court, declared unconstitutional and void.

The proceedings of the court of common pleas, under the application for the benefit of the law for the relief of occupying claimants are reversed, and the cause remanded.

SAMUEL FOSDICK v. BARR ET AL.

A levy and sale of land upon execution will confer a title paramount to a prior assignment of the property, made by the judgment debtor to a creditor, to secure a debt which has not been acknowledged or recorded.

An unrecorded mortgage or equitable assignment is good and effectual between the parties; but as to the third persons, it takes effect, either at law or in equity, only from the time it is duly recorded.

CHANCERY. Reserved in Scioto county.

The whole case is not examined in the opinion below; a sufficient statement is furnished by the opinion itself.

Fox & French, for plaintiff.

Creighton & Moore, for defendant.

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RANNEY, J. We shall attempt to decide but a single question. 472] All else involved in the case is matter of detail, *and can be better settled in the district court. Barr, being the owner of certain lands in the town of Portsmouth, gave to the defendant, Tracy, a power of attorney to sell and convey them. Before the 19th of January, 1846, Tracy had sold and conveyed certain portions of the property, and had contracted with several persons for the sale of certain other portions. Barr, being indebted to the trustees of Mrs. Kneeland in the sum of \$6,000, for the purpose of securing the debt, on that day assigned to them all the property, notes, and mortgages in the hands of Tracy; but this assignment has never been acknowledged or recorded. Tracy continued to sell other portions of the property, until about February 8, 1848, when Barr, being indebted to the complainant in a large amount, for the purpose of securing the sum of \$10,000, assigned to him all the property, notes, and claims covered by the assignment to Mrs. Kneeland, with an inconsiderable exception, which is claimed to have been omitted by mistake; but this assignment was never acknowledged or recorded.

Barr was also indebted to Peter J. Nevins & Sons, for which judgments were rendered by the Superior Court of Cincinnati, on which the plaintiffs issued executions, and caused them to be levied on the unsold portion of these lands, on the 18th of March, 1848; and on the 28th of April, 1849, bid them off at sheriff's sale, with full notice, as is claimed, of the assignments to Mrs. Kneeland, and the complainant.

The question is, are these equitable assignments to be preferred to the levy and sale under the judgments of Nevins & Sons?

If any question can be treated as settled by an unbroken current of judicial decisions, covering a period of more than ten years, and notwithstanding the constant changes upon the bench, made at all times without a dissenting voice, it seems to us that this should now be so regarded. In *Stansell v. Roberts*, 13 Ohio, 148, the contest arose between two mortgages, and the court held, *C. J. Lane deliv-* 473] *ering* *the opinion, that the lien of the second mortgage, being first recorded, should be preferred, notwithstanding the mortgagee had actual notice of the first. In *Mayham v. Coombs*, 14 Ohio, 428, the same decision was made, and the reasons for it assigned at length by Judge Hitchcock. At the same term, in *Jackson v. Luce*, 14 Ohio, 514, the lien of a judgment by confession,

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entered after the mortgage was recorded, on the second day of the term, was carried back, by relation, to the first day, and preferred to the mortgage.

In *White v. Denman*, 16 Ohio, 59, the mortgage, although recorded, was defectively executed, and a junior judgment lien was preferred. Birchard, C. J., in delivering the opinion, concedes that it ought to be treated between the parties as a valid, equitable mortgage; but as no legal estate had passed, the judgment creditor having equal equity, and a better legal claim, could not be displaced.

In the case of *Holliday v. The Franklin Bank of Columbus*, 16 Ohio, 533, the same principles are enforced with much clearness and force by Read, J.

A bill of review was filed in the case of *White v. Denman*, which was finally, by the unanimous judgment of this court, dismissed at the January term, A. D. 1853. 1 Ohio St. 110. Our reasons for adhering to the decisions made by our predecessors are there fully stated, and need not be repeated.

It is to be observed that all these decisions were made under the act of February 22, 1831, to provide for the proof, acknowledgment, and recording of deeds and other instruments of writing; and all are made to depend entirely upon the construction to be put upon the 7th section of that act, which provides "that all mortgages executed agreeably to the provisions of this act, shall be recorded in the office of the recorder of the county in which such mortgaged premises are situated, *and shall take effect from the time the same are recorded.*" Before that time, no such provision had been incorporated into our statutes; but mortgages were allowed to be recorded in the same time as absolute deeds. Of course, [474] judicial decisions made upon mortgages executed under prior laws, have no relation whatever to the question.

In all the cases to which I have referred, the general rules were pressed upon the court, that such an unrecorded mortgage created, at least, an equity between the parties, which would be held good as against a subsequent mortgage with notice of such equity, and that a judgment creditor took a lien only upon such interest as his debtor had when the judgment was rendered, and was bound by all the equities that could be asserted against the debtor. The court, in *Holliday v. The Franklin Bank*, admit that "this would be the result, if we reasoned upon the ordinary doctrine governing equities," but this conclusion is disturbed by the statute, which steps in and

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declares, in such case, that mortgages shall take effect and have precedence from the time of delivery for record. The court has declared, therefore, that they shall have no effect, either in law or equity, before such delivery." They have regarded the statute as designed to "put at rest all the vexed questions as to precedence, and to enable all persons certainly to know whether the property of persons to whom they extend credit is incumbered or not, without being involved in the vexed questions of prior equities and notice." That it was competent for the legislature so to declare, no one will doubt; that it has so declared, the highest court in the state has again and again decided. Upon the faith of this, men have dealt, and property has changed hands, until it is now altogether too late to think of returning to a construction, which would have the effect of overturning so many transactions. That the court truly interpreted the legislative will, may be very properly assumed, from the fact that this course of decision has been left undisturbed by that body for so long a period of time, and from the very noticeable circumstance, that immediately after the decision of the case of *Jackson v. Lee*, the matter was brought to their attention, and a most palpable injustice corrected without any attempt to change the general doctrine. As, however, these decisions have all been 475] *made at the instance and to protect the interests of third persons; and as the whole object and policy of the recording act was designed for their benefit, we have felt at liberty, at the present term, to restrict, somewhat, the general language used in some of the cases, or rather to apply it strictly to the facts involved in these cases, and to hold that such unrecorded instruments are good and effectual between the parties; but entirely nugatory as to third parties, both at law and in equity, until they are recorded.

This opinion will be certified to the district court, and the cause remanded for final decree.

**FREDERICK MILLER v. THE STATE OF OHIO, AND LEVIN GIBSON v.
THE STATE OF OHIO.**

For aught that appears in the journals of the senate and house of representatives of the general assembly, the act of May 1, 1854, entitled "an act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," was constitutionally enacted.

The provision of the constitution art. 2, sec. 16, that "every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending, shall dispense with this rule," does not require that every amendment to a bill shall be read three times.

Every reasonable intendment is to be made in favor of the proceedings of the legislature. It is not to be presumed that the assembly, or either house of it, has violated the constitution. When, therefore, it appears by the journals, that a bill was amended by striking out all after the enacting clause, and inserting a "new bill," so called, it can not be presumed that the matter inserted was upon a different subject from that stricken out; especially when the matter inserted is consistent with the title borne by the bill before such amendment. This is the more obvious since the constitution provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." (Art. 2, sec. 16.) Nor does the fact that the inserted matter is called a "new bill," prove that it was not an amendment.

No bill can become a law without receiving the number of votes required by the constitution, and if it were found, by an inspection of the legislative journals, that what purports to be a law upon the statute-book was not passed by the requisite number of votes, it might possibly be the duty of the courts to treat it as a nullity. But it does not follow that an act [476 that was passed by a constitutional majority is invalid, because, in its consideration, the assembly did not strictly observe the mode of procedure prescribed by the constitution. There are provisions in that instrument that are directory in their character, the observance of which by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts.

Neither the 1st, 2d, 3d, 4th, nor 8th section of the act under consideration, properly construed, is repugnant to the constitution. In saying this, we do not mean to affirm that the legislature has the power to wholly prohibit traffic in intoxicating liquors in this state. Without deciding whether the assembly has any power over this subject by virtue of the general grant of legislative power in section 1 of article 2 of the constitution, we hold that the enactment of said sections of the law is authorized by the express grant of power in section 18 of article 16, in these words: "No license to traffic

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in intoxicating liquors shall hereafter be granted in this state, but the general assembly may, by law, provide against evils resulting therefrom."

A violation of either the 1st, 2d, or 3d sections of the act subjects the offender to the penalties mentioned in the first clause of section eight. It is not necessary, in order to incur these penalties, that all three sections be violated.

If a sale violate all three sections, the offender may be prosecuted under either of them; and his conviction or acquittal will bar a prosecution for the same sale under either of the other two sections.

But a conviction or acquittal under the 1st, 2d, or 3d section is no bar to a prosecution under the fourth.

To convict for a violation of the second section, it is necessary to aver in the information, and prove on the trial, that the seller knew the buyer to be a minor; and to convict for a violation of the third section, it is necessary to aver and prove, in like manner, that the seller knew the buyer to be intoxicated, or in the habit of getting intoxicated. Birney's case, 8 Ohio, 237, followed and approved.

To convict for a violation of the fourth section, it is necessary to aver in the information, and prove on the trial, that the place where the liquor was sold, was a *place of public resort*. And the proof must also show that it was a place where liquors were *habitually* sold in violation of the act. A single sale does not make the place a nuisance, or the seller a "keeper," within the meaning of the act. A series of sales is necessary.

No order to shut up or abate the place can rightfully be made, unless the nuisance continues to exist at the time such order is made. Unless, therefore, the court is satisfied that, at the time of making the order, the place is kept for the sale of liquors, in violation of the act, no order should be made. For it is the unlawful business (and not the place, *per se*) that 477] *creates the nuisance; and, hence, where the business has ceased, there is no nuisance to abate. No man's property can be forfeited as a punishment for crime, the constitution providing that no conviction shall work a "forfeiture of estate," Article 1, section 12. Hence, there is no power to deprive a man of the use of his property, unless it be necessary in order to abate an *existing* nuisance.

The order is not to be directed to any officer. It is not an order to be executed by an officer. It is an order to the person convicted, obedience to which may be enforced, if the nuisance be continued, by attachment for contempt of court. The order being made, if the convict cease to keep a house of public resort, of the character named or referred to in the fourth section, he need give no bond; and having so ceased, no attachment can properly be issued against him. But if he desire to continue keeping such house of public resort, he must, in order to avoid an attachment, give bond. He has his election to quit keeping a house of public resort, or to give bond, and keep it without violating the law.

The following information is sufficient in law.

"THE STATE OF OHIO, CLEMMONT COUNTY, ss. Probate court, May term, in the year of our Lord one thousand eight hundred and fifty-four: John John-
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ston, Prosecuting Attorney of the State of Ohio, for the said county of Clermont, now here in said probate court, in and for said county, in the name and by the authority, and on behalf of the said State of Ohio, information makes, that on the second day of May, in the year of our Lord one thousand eight hundred and fifty-four, and from that day until the commencement of proceedings herein, to wit, on the twenty-third day of May, in the year aforesaid, at the said county of Clermont, in the said State of Ohio, one Frederick Miller was, and has been, unlawfully the keeper of a room of public resort, where intoxicating liquors were and have been then and there sold by said Frederick Miller, in violation of an act of the general assembly of the State of Ohio, entitled "an act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," and passed by said general assembly on the first day of May, in the year aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

"JOHN JOHNSTON, *Prosecuting Attorney of Clermont County.*"

A prosecution under this act can not be commenced in the probate court. It must be commenced before a justice of the peace or mayor. But no very strict conformity between the information and the original complaint is necessary. If the charge is substantially the same in both, there is no room to quash the information on the ground of variance. The proper rule upon this point has already been stated at this term, in *Gates and Goodno v. The State*.

Nul tiel record is not a proper replication to the plea of former conviction prescribed in the probate code; for there is no *profert* of a record in the plea. *The proper replication is a general denial of the allegations [478 of the plea; and the issue thus made up is to be tried by the jury impaneled in the case.

Frederick Miller v. The State. In error to the probate court of Clermont county.

Levin Gibson v. The State. In error to the probate court of Union county.

The plaintiffs in error were prosecuted for violations of section 4 of the act of May 1, 1854, entitled "an act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio;" which section provides: "That all places where intoxicating liquors are sold in violation of this act, shall be taken, held, and declared to be common nuisances, and all rooms, taverns, eating-houses, bazars, restaurants, groceries, coffee-houses, cellars, or other places of public resort, where intoxicating liquors are sold in violation of this act, shall be shut up and abated as public nuisances, upon the conviction of the keeper thereof, who shall be punished as hereinafter provided."

Being convicted, they were, respectively, sentenced to pay fines and be imprisoned; and orders made that the rooms by them kept should be shut up until bond and security should be given, pursu-

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ant to the 8th section of said act. To reverse which sentences and orders these writs were brought.

Pugh, Corwine, Hays & Rogers, Dennison, Lewis, and Cole, for plaintiffs in error, cited: Senate Journal of 1854; *McBride's case*, 4 Mo. 303; *Purdy's case*, 4 Hill, 390; the *Prince case*, Coke, 28; *Robotham's case*, 3 Burr. 1472; *Warner v. Beers*, 23 Wend. 104; 5 Ohio, 363; *Jefferson's Manual*, 100; and Constitution of Ohio, article 1, secs. 1, 19; article 2, sec. 16; and Schedule, sec. 18.

McCook, attorney-general, and *P. B. Wilcox*, for the state, cited: 22 Wend. 113; 23 Wend. 103; Smith on Statutory Construction, 732, 854, 864, 859, 943; *Jefferson's Manual*, secs. 24, 25, 31 35; *Wharton's Pr.* 475; 6 Cranch, 7; 4 Vt. 140; and 4 Serg. & Rawle, 145.

479] *THURMAN, C. J. The main questions discussed in these cases, are of more than usual importance, and deserved to be, and were, very ably argued by counsel. Their decision involves not only the cases before us, but a multitude of others; not only the validity of the statute here drawn in question, but that of many more; not merely the correctness of legislative action, but also the extent of judicial power.

By the sixteenth section of the second article of the constitution, it is provided, among other things, in reference to legislative proceedings, that "every bill shall be fully and distinctly read, on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending, shall dispense with this rule." And "no bill shall contain more than one subject, which shall be clearly expressed in its title."

For the plaintiffs, it is contended that this section of the constitution was disregarded by the assembly in passing the act under consideration, in this, that the bill was not read on three different days, or even three different times, although such readings were not dispensed with by a three-fourths vote; and hence it is argued the act is necessarily void.

Assuming, for the present, without so deciding, that this question arises upon the records, and that the journals of the assembly may be looked at to ascertain the facts, I come at once to the questions, what are the facts? and what is their effect upon the validity of the act? The facts supposed to be material, are, that the bill originally introduced, after being read twice, and on different days, was com-

mitted to a select committee, who reported it back with one amendment, to wit: "strike out all after the enacting clause and insert a new bill;" that on a subsequent day, April 12th, this amendment, after being itself amended, was agreed to, and the bill, as amended ordered to be engrossed and read a third time to-morrow; that on the morrow (April 13th), it was "read the third time" and passed, and having afterward passed the house, and been duly enrolled, was signed by the *presiding officers of the two houses, filed in [480 the proper office, and published among the laws.

From these facts, it appears, says the plaintiffs' counsel, "that the 'new bill,' which finally passed the senate, was read but *once* in that body." It would be more accurate to say that but one reading of the amendment is *recorded*, for it does not *affirmatively* appear that it was read *but once*. On the contrary, it might fairly be presumed, if presumptions are admissible to supply defects in the journal, that it was read three times, and upon different days. For it was reported on March 27th, and laid upon the table and ordered to be printed; on April 17th, taken up, committed to the whole senate, and reported back with various amendments, all which were considered and agreed to; on the same day, committed to the committee on the judiciary, and by that committee, on April 12th, reported back with eight amendments, which were also considered and agreed to; afterward, and on the same day, amended still further, and thereupon ordered to be engrossed and read a third time the next day; then the vote ordering the engrossment reconsidered, the amendment (the so-called "new bill"), "as amended by the senate," agreed to, and the bill, thus amended, ordered to be engrossed and "read a *third* time on to-morrow;" and, accordingly, it was engrossed, and on the next day, "read the *third* time and passed." Senate Journal, 340, 401, 408, 425, 431, 432, 438. And, as before stated, after it had passed both houses, it was signed, as the constitution requires, filed among the proper archives, and duly published as a law.

Now, presumptions are every day made, to support the proceedings of the courts, far more liberal than would be a presumption that this so-called "new bill" was read on three days, and it is difficult to perceive why the proceedings of the assembly are not entitled to as much favor as the doings of the courts. The latter are as much bound as the former to keep a record, or journal, and no one will pretend that legislative records should be more full and

481] perfect than *judicial. If a strict, literal, compliance with every constitutional requirement, however minute, is necessary to the validity of a law, and the courts are bound to hold that nothing was done but what appears in the legislative journals, it is easy to demonstrate that not a single statute enacted since the constitution took effect, can be upheld. It is nowhere stated in the journals that any reading of a bill was *full* and *distinct*, although the constitution requires that every reading shall be so. But surely this omission does not vitiate every act that has been passed, and make it the duty of the courts to hold them null and void. Everybody, I suppose, would admit that the reading being stated, the fullness and distinctness thereof may be presumed. If so, why may not three readings, and on different days, be presumed, when to do so contradicts nothing in the journal, but, on the contrary, is entirely consistent with it? In the case before us, the journal of April 13th expressly says that the bill in question was that day "read the *third* time" and passed. This imports that it had previously been read twice, and as the journal shows that it was considered on March 27th, when the amendment called a "new bill" was reported, and again on the 7th and 12th of April, why may it not be presumed that there were two prior readings on two of these three days?

But, for argument's sake, let it be admitted that the bill as amended was read but once in the senate; is the act for that reason void? That, counting the two readings before the amendment, and the final reading, the bill was read three times, is conceded, for these readings are shown by the journal, and it is also conceded that, in general, three readings of an amendment are not necessary. But inasmuch as the amendment in this case is styled in the journal a "new bill," it is said that three readings were necessary. Why necessary? The amendment was none the less an amendment because of the name given it. It is not unusual, in parliamentary proceedings, to amend a bill by striking out all after the 482] enacting clause and inserting a new bill. Jefferson's *Manual, sec. 35. When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different days; but when there is no such vital alteration, three readings of the amendment are not required.

Now, in the case before us, we have no means of knowing what was the change effected by the amendment in question. Neither bill nor amendment is spread upon the journal, and unless we were

to run into the absurdity of receiving parol proof and trying the validity of a statute upon the testimony of witnesses, we could not say that any substantial change was made. For aught that we have before us, or can properly look at, the "new bill" may have been, with the exception of a single word, and that not material, identical with the matter stricken out.

Nor is it to be forgotten that every reasonable intendment is to be made in favor of the proceedings of the legislature. It is not to be presumed that the assembly, or either house of it, has violated the constitution; when, therefore, it appears by the journals that a bill was amended by striking out all after the enacting clause and inserting a "new bill," so called, and but one reading after the amendment is recorded, it can not be presumed that the matter inserted was upon a different subject from that stricken out, especially when the matter inserted is consistent with the title borne by the bill before the amendment. This is the more obvious and reasonable since the constitution provides that, "No bill shall contain more than one subject, which shall be clearly expressed in its title." Art. 2, sec. 16.

On the whole, we find nothing in the journal that would warrant us in holding that the amendment in question was of a character requiring it to be read three times.

Another view of this subject remains to be presented:

A statute may, upon its face, be repugnant to the constitution, and therefore void, no matter how regular may have been the steps by which it was enacted. And although the power was at one time very seriously denied, yet it is no longer to be doubted [483] that the courts are bound to treat such a statute as a mere nullity.

But the case is quite different where no such repugnancy appears in the act itself, and its validity is assailed upon the ground that it was not passed in the *mode* prescribed by the constitution. By the term "*mode*," I do not mean to include the *authority* in which the law-making power resides, or the number of votes a bill must receive to become a law. That the power to make laws is vested in the assembly alone, and that no act has any force that was not passed by the number of votes required by the constitution, are nearly, or quite, self-evident propositions. These essentials relate to the authority by which, rather than to the mode in which, laws are to be made.

Now, to secure the careful exercise of this power, and for other

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good reasons, the constitution prescribes or recognizes certain things to be done in the enactment of laws, which things form a course or mode of legislative procedure. Thus we find, *inter alia*, the provision before quoted, that "every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule." This is an important provision, without doubt; but, nevertheless, there is much reason for saying that it is merely directory in its character, and that its observance by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. Any other construction, we incline to think, would lead to very absurd and alarming consequences. If it is in the power of every court (and if one has the power every one has it) to inquire whether a bill that passed the assembly was "*fully*" and "*distinctly*" read three times in each house, and to hold it invalid if upon any reading a word was accidentally omitted, or the reading was indistinct, it would obviously be impossible to know what is the statute law of the state. Now, the requisition that bills shall be fully and distinctly read, is just as imperative as that re-484] quiring them *to be read three times, and as both relate to the mode of procedure merely, it would be difficult to find any sufficient reason why a violation of one of them would be less fatal to an act than a violation of the other.

And here it is to be observed, that the difficulty is not avoided by the rule in 5 Ohio, 363, which forbids a contradiction of the journal by parol proof; for, as we have seen, the journal is uniformly so made up that it would not be contradicted by proof that the reading of a bill was not distinct.

But whether the constitution, in the particular under consideration, is merely directory or not, it can not be gainsaid. It seems to us, that where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution requires, the presumption is that it was so read, and this presumption is not liable to be rebutted by proof. If it be said, as was said in the argument, that this leaves the assembly at liberty to disregard the constitution, the answer is obvious, that a disposition to disregard it is no more to be imputed to the legislative than to the judicial department of the government, and ought not to be imputed to either. The members of both departments take an oath to support that instrument, and we are not at liberty to assume that the

sense of duty and of the obligation of an oath is weaker in the one than in the other. True, the courts are made the judges in the last resort of the constitutionality of all laws, and, as before remarked, where a statute is on its face plainly unconstitutional, it is their duty so to declare it; but it does not necessarily follow that they are authorized to supervise every step of legislative action, and inquire into the regularity of all legislative proceedings that result in laws.

It is next contended by the plaintiffs in error, that "the act prohibits the sale of intoxicating liquors to be drunk at the place where sold, and it therefore violates section 18 of the schedule to the constitution," which section reads as follows: "No license to traffic in intoxicating liquors shall *hereafter be granted in this state, [485 but the general assembly may by law provide against the evils resulting therefrom."

The latter clause of this section, say counsel, "is clearly a limitation of the power of the general assembly, under which they may not prohibit such sale, but may pass laws providing against the evils resulting therefrom."

It is further contended, that "the first, second, third, fourth, and eighth sections of the act are unconstitutional. They work, in their practical operations, a complete *prohibition* upon the sale of intoxicating liquors in the State of Ohio. In the first place, they deny the right to sell in *any* quantity, to be drunk in, upon, or about the building, etc., where sold. In the second place, the second section prohibits altogether the sale to minors. In the third place, the third section interdicts the sale to persons intoxicated, etc. In the fourth place, the fourth section denounces the place where liquors may be sold, as a common nuisance. But it goes a step further, and declares that all places where intoxicating liquors are sold in violation of the act shall be *shut up* and *abated*. Thus it will be seen that the law, in terms, prohibits the sale altogether, as far as the *place*, and as far as certain *persons* are concerned."

In support of these views, counsel, in addition to the section before quoted from the schedule, cite the first, nineteenth, and twentieth sections of the bill of rights, by which it is declared, among other things, that all men have the inalienable right of "acquiring, possessing, and protecting property;" that "private property shall ever be held inviolate, but subject to the public wel-

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fare," and that "this enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

We are unable to perceive that either of these provisions of the constitution, or any of its other provisions, is violated by the law in question. In saying this, we by no means affirm that the legislature has the power to wholly prohibit *traffic in intoxicating liquors. Without deciding what, if any, authority over this subject can be derived from the general grant of legislative power in section 1 of article 2 of the constitution, we hold that the act before us is authorized by the express grant of power in section 18 of the schedule already quoted; for the law is not prohibitory, nor does it interfere, in any degree, with any right of property. It belongs to that class of legislative acts commonly called "police laws," and is framed with a view to regulate, and not to destroy. It seeks to do, by constitutional means, what the assembly is expressly authorized to do, provide against the evils resulting from the traffic in intoxicating liquors. One of the greatest of these evils is the congregation of idle and dissolute persons at places where liquors are sold and drunk; hence the sale of liquor to be drunk at the place where sold, is prohibited. Another evil is the sale to minors and persons intoxicated, or in the habit of getting intoxicated; hence, the sale to the former is prohibited, except upon the order of their parents, guardians, or family physicians, and the sale to the latter is prohibited altogether. And inasmuch as the habitual violation of these provisions does, in fact, create a nuisance, it is declared to be one in law, and authority is given, not to abate any man's house, but to abate the nuisance that exists thereat.

The idea apparently contended for, that the constitution recognizes an uncontrollable, illimitable right to sell intoxicating liquors, is manifestly erroneous. There is no such right in respect to any commodity, however harmless; for, if there were, how could the various inspection laws, the laws relating to markets, the license laws, the Sunday law, etc., be sustained? A power of regulation, a power to provide against evils incident to traffic, a power to protect community against the frauds or dangerous practices of trade, is, in a greater or less degree, vested in every government, and certainly the people of Ohio are not wholly without this protection.

487] If to guard against these evils, some restraint upon *the

traffic itself is necessary, it may lawfully be imposed, the fact being always borne in mind, and always acted upon, that the power is a power to regulate, and not to destroy. To this power intoxicating liquors are expressly subjected by the constitutional provision I have quoted; but were that provision stricken out of the constitution the power would yet subsist; and for the same reason that it might be declared unlawful to sell poison to a child, or a dagger to a madman, it might be made an offense to sell intoxicating drink to a minor or a drunkard; and for the same reason that any other common nuisance might, by law, be abated, the business of a common tippling-house might be subjected to that fate.

In the present cases, and others submitted with them, numerous questions arise upon the statute under consideration. In regard to these questions, I shall do little more than state our conclusions, and refer generally to the authorities cited by counsel. It would extend this opinion to a very inconvenient length were I to go fully into the reasons that bring us to these conclusions. We hold as follows:

1. A violation of either the first, second, or third sections of the act subjects the offender to the penalties mentioned in the first clause of section 8. It is not necessary, in order to incur these penalties, that all three sections be violated.

2. If a sale violate all three sections, the offender may be prosecuted under either of them; and his conviction or acquittal will bar a prosecution, for the same sale, under either of the other two sections.

3. But a conviction or acquittal under the first, second, or third sections, is no bar to a prosecution under the fourth.

4. To convict for a violation of the second section, it is necessary to aver in the information, and prove on the trial, that the seller knew the buyer to be a minor; and to convict for a violation of the third section, it is necessary to aver and prove, in like manner, that the seller knew the buyer to be intoxicated, or in the habit of getting intoxicated. Birney's case, 8 Ohio, 237.

- *5. To convict for a violation of the fourth section, it is necessary to aver in the information, and prove on the trial, that the place where the liquor was sold was a *place of public resort*; and the proof must also show that it was a place where liquors were *habitually* sold in violation of the act. A single sale does not make the

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place a nuisance, or the seller a "keeper," within the meaning of the act. A series of sales is necessary.

6. No order to shut up or abate the place can rightfully be made, unless the nuisance continues to exist at the time such order is made. Unless, therefore, the court is satisfied that, at the time of making the order, the place is kept for the sale of liquors in violation of the act, no order should be made. For it is the unlawful business, and not the place, *per se*, that creates the nuisance; and hence, where the business has ceased, there is no nuisance to abate. No man's property can be forfeited as a punishment for crime, the constitution providing that no conviction shall work a "forfeiture of estate." Art. 1, sec. 12. Hence there is no power to deprive a man of the use of his property, unless it be necessary in order to abate an *existing* nuisance.

7. The order is not to be directed to any officer. It is not an order to be executed by an officer. It is an order to the person convicted; obedience to which may be enforced, if the nuisance be continued, by attachment for contempt of court. The order being made, if the convict cease to keep a house of public resort of the character named or referred to in the fourth section, he need give no bond; and having so ceased, no attachment can properly be issued against him. But if he desire to continue keeping such house of public resort, he must, in order to avoid an attachment, give bond. He has his election to quit keeping a house of public resort, or to give bond and keep it without violating the law.

8. The following information is sufficient in law:

"The State of Ohio, Clermont County, ss:

"Probate court, May term, in the year of our Lord one thousand eight hundred and fifty-four: John Johnston, prosecuting attorney of the State of Ohio, for the said county of Clermont, 489] *now here in said probate court, in and for said county, in the name and by the authority and on behalf of the said State of Ohio, information makes that on the second day of May, in the year of our Lord one thousand eight hundred and fifty-four, and from that day until the commencement of proceedings herein, to wit, on the twenty-third day of May, in the year aforesaid, at the said county of Clermont, in the said State of Ohio, one Frederick Miller was and has been unlawfully the keeper of a room of public resort, where intoxicating liquors were and have been then and there sold by said Frederick Miller in violation of an act of the general assembly of the State of Ohio, entitled 'an act to provide against the evils resulting from the sale of intoxicating liquors in

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the State of Ohio,' and passed by said general assembly on the first day of May, in the year aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

JOHN JOHNSTON,

"Prosecuting Attorney of Clermont County."

9. A prosecution under this act can not be commenced in the probate court. It must be commenced before a justice of the peace or mayor. But no very strict conformity between the information and the original complaint is necessary. If the charge is substantially the same in both, there is no room to quash the information on the ground of variance. The proper rule upon this point has already been stated at this term in *Gates and Goodno v. The State*.

10. *Nul tiel record* is not a proper replication to the plea of former conviction prescribed in the probate code; for there is no *profert* of a record in the plea. The proper replication is a general denial of the allegation of the plea; and the issue thus made up is to be tried by the jury impaneled in the cause.

Judgments and orders reversed.

SIMEON JENNINGS v. CYRUS MENDENHALL ET AL.

The transcript mentioned in section 517 of the code, to be filed with a petition in error, is a complete transcript, and not a copy of the journal entries merely.

APPLICATION for leave to file petition in error.

*THURMAN, C. J. The transcript filed with the petition is [490 a copy of the journal entries merely. This is not sufficient. The transcript mentioned in section 517 of the code is a complete transcript. It should be a copy of the complete record, if that has been made up. If that had not been done, it may be made from the files and journals. The original papers of the court below are no longer sent to the court of errors, the statute under which that was done having been repealed. The clerk of the court below ought not to suffer them to go out of his possession.

Application refused.

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SAMUEL R. HUTCHINSON AND THOMAS FLOYD v. THE CANAL BANK OF CLEVELAND.

In an action on an acceptance, in which, by proper plea, the defendants denied that they had accepted the bill, testimony was offered to show an admission by defendants, that they had become bound by acceptances in favor of the same drawer, on two bills, of which the plaintiff claimed that declared on to be one. To prove that the two bills, whose execution had been thus admitted, had returned to the defendants, the latter produced, and offered to put in evidence, two bills bearing date anterior to the admission, drawn by the same drawer, and shown to be signed with his signature, but did not prove, or offer to prove, that they had ever been in the drawer's hands, or that the defendants had ever become bound on them. *Held*, that the court properly rejected the bills so offered as evidence.

ERROR to the district court of Cuyahoga county.

The plaintiff below, here defendant, declared against the defendants upon the bill of exchange, drawn by S. Holmes & Co., for \$3,000, and accepted by the defendants. The defendants by their plea denied that they had accepted the draft upon which the action was founded. In the Superior Court of Cleveland the plaintiff obtained a verdict, whereupon the defendant moved for a new trial, which motion being overruled, the defendant tendered the following bill of exceptions: "Be it remembered, that on the trial of this cause, the plaintiff, in order to prove the issue on its part, called a witness, T. C. Severance, who testified, among other things, that he was, prior to the date of the draft declared on, and still was, cashier of said Canal Bank. That on the 20th day of October, 1851, said draft was discounted by said bank for William Hittleberger, who then indorsed the draft, and that the draft was immediately sent away. That two or three days after the draft had been discounted and sent away, the defendant, Hutchinson, called at the bank and made an application for a discount, and, as a reason why it ought to be granted, he remarked that the bank did not then hold any of his paper or that of his firm (S. R. Hutchinson & Co.) He further testified that he then told said Hutchinson that the bank had discounted the draft in question; that Hutchinson seemed to be very much surprised, and said that there must be some mistake, that the paper could not be theirs; that witness turned to the books and gave Mr. Hutchinson a description of the

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draft ; that Hutchinson still seemed surprised, and said there must be something wrong about it, and repeated the expression several times that there must be something wrong about it, and went on to remark that Holmes, the drawer of the draft, had not had but two acceptances, or pieces of the paper of said S. R. Hutchinson & Co. ; that he had had those two for the purpose of getting them discounted east for the benefit of said Hutchinson & Co., or to replace money which they had advanced to said Holmes ; and that said Hutchinson further remarked that Holmes had not been able to get the paper discounted east, and that one of the pieces had already been returned to them (Hutchinson & Co.), and that the other was lodged in some bank east for discount, and if not discounted, was soon to be returned to them, the said S. R. Hutchinson & Co. Witness did not recollect whether said Hutchinson, in speaking of the two pieces of paper which had been given to said Holmes, used the expression, acceptances or pieces of paper, but witness understood him to mean acceptances, *as they [492] were spoken of in connection with the conversation in relation to the acceptance declared on in manner above stated. Said witness stated that he had had two conversations with said Hutchinson on the same day, one before and one after he (Hutchinson) had seen Holmes, the drawer of the draft. Witness said he did not know whether it was at the first or second of these conversations that said Hutchinson had spoken of the two acceptances or pieces of paper, which had been given to said Holmes, but it was at one of them, and before said Hutchinson had an opportunity to see the draft which had been discounted. Several witnesses were examined on both parts touching the genuineness of the signature of S. R. Hutchinson & Co. (the defendants) to the draft declared on ; and the plaintiff had also offered testimony tending to prove that said S. R. Hutchinson had, a short time previous to the date of the draft declared on, written something on a sheet of blank drafts, similar in form to the draft declared on, and left them with said Holmes ; which testimony had been offered in order to prove that he gave said Holmes blank acceptances. After the testimony was closed on the part of the plaintiff, and after the defendants had called sundry witnesses on other points made in the case, in order to prove that the two pieces of paper which said Hutchinson had stated to said Severance that he or S. R. Hutchinson & Co. had given to said Holmes had been returned to said defend-

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ants, and for no other purpose, offered in evidence two drafts (annexed), having first proved that the signatures of the drawers, S. Holmes & Co., were genuine."

The plaintiff objected to the admission of the drafts, unless it also be proposed to prove that the defendants had become parties to the drafts, and also that the drafts had been in the hands of said Holmes. The counsel for the defendants having stated that they did not purpose to offer any additional testimony respecting the drafts, the court sustained the plaintiff's objection, and ruled out the drafts, to which ruling the defendants excepted.

493] *The district court affirmed the judgment of the Superior Court; whereupon the plaintiff in error filed this petition in error.

O. Stetson, for plaintiffs in error.

Bishop, Backus, and Noble, for defendant.

WARDEN, J. The drafts described in the bill of exceptions were properly rejected. The mere possession of them at the time of the trial was not enough to make them any evidence whatever against the plaintiff below. From the proof of possession at a former day, a legal presumption of continuance of the same possession down to the time of trial might have arisen. Nothing is better settled than that a presumption is sometimes well founded on the continuance, the permanency, the longer or shorter duration of a thing, the use of that thing, the state of mind, or the like, which is commonly experienced or observed. But the possession of to-day furnishes no presumption of its existence yesterday; and, at least where it stands alone, the proof of such a possession does not even tend to show an earlier one. The evidence of age manifested by a writing itself may, when connected with other proof, though the latter be very slight, assist in verifying, or even satisfactorily establish, the date it bears; and a possession held at the time of trial, may, in some cases, satisfy the jury that it must have begun at the time when the instrument purports to have been delivered. But the mere production of a paper bearing a date anterior to the time of offering it, contains no evidence whatever that it was ever before in the keeping of the party. Where the beginning of a possession is established, its continuance, according to its own nature, and the conditions of its existence, is a fair and certain presumption. And, in the case of a deed, in many instances that might be put for illus-

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tration, the date may well be taken as the true time of delivery, although no direct proof that the party producing the paper ever had it in his hands before the time of trial should be given. But these papers are not of such a character. They *do not, in [494 any sense, prove themselves, and their mere possession is not enough to show that they existed for a single hour before they were offered. True, in such a case, fraud would not be presumed. The papers, however, are not excluded on any presumption of their fraudulent character. They are rejected because they are not sufficiently proven, and because no presumption, either of fraudulent execution, or of earlier possession, applies to them. On this ground, as well as on the uncertainty of their identity on their face with those described by Hutchinson in the conversation with Severance, the court properly excluded them.

Judgment affirmed.

SHELDON'S LESSEE v. OREN NEWTON.

The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented, which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained.

When these appear, the jurisdiction has attached; the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally in question.

The proposition that the jurisdiction can be made to depend upon the record's disclosing such a state of facts to have been shown in evidence, as to warrant the exercise of its authority, was distinctly repudiated in the early case of Ludlow's Heirs v. Johnston, 3 Ohio, 560, and has been no less positively denied in every subsequent case, including Adams v. Jeffries, 12 Ohio, 253. This court wholly dissents from it, both on reason and on authority.

These rules apply to proceedings of the old court of common pleas in Ohio,

on petition by executors or administrators for the sale of real estate to pay debts.

That court was one of record, of general common-law and chancery jurisdiction; 495] and while, in the exercise of this particular authority, it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered that it was the tribunal created by the constitution with the exclusive jurisdiction over probate matters, and had no one single characteristic of those inferior courts and commissions to which the opposite rules to those before mentioned, have been applied by the English and American courts.

The proceeding authorized by the act of 1824, tested by its nature and essential qualities, would seem to be clearly enough a proceeding *in rem*. On the death of the owner, the law charged his debts as a specific lien on all his property, and held it subject to their payment. The legal title to the real estate descended to the heir subject to this paramount lien. The executor or administrator was a trustee alike for creditors and heir; and the order of sale upon his petition operated on the estate and not on the heir, and the purchaser, by operation of law, took the paramount title of the ancestor, and did not claim through or under the heir.

The heir was required to be made a party to the proceedings, with a view to his having notice; but it is nowhere intimated, that a failure to give notice should deprive the court of jurisdiction over the property.

But whether the entire want of notice would warrant the collateral impeachment of the proceedings or not, no particular form of process or mode of giving notice to the defendants, was provided by statute. The necessity of giving any notice is only to be inferred from the fact that the heirs are required to be made defendants.

This omission in the law had to be supplied by a course of practice in the several courts invested with the jurisdiction.

In the case of minor heirs, the practice was general to serve the process upon the general guardian, or a guardian *ad litem*, or to permit an appearance, without process, by either.

Decisions recognizing this practice as sufficient to fix the jurisdiction, have stood as the law of the state for more than twenty years. During all that time, they have constituted rules of property, and upon the faith of them men have invested their money. If ever an urgent case for the application of the maxim *stare decisis* existed, this is one.

If an administrator purchases at his own sale, while the property remains in his hands, or in the hands of any purchaser from him with notice, the sale may be set aside in chancery at the election of the heirs, and the property again put up.

When an infant purchases at such sale, for the administrator, and immediately conveys to him, he can not disaffirm such sale on arriving at full age, as though the lands belonged to him. The law is perfectly settled, that an infant may absolutely and irrevocably execute a power, either by absolute deed, or otherwise, as fully and effectually as an adult.

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EJECTMENT. The case was reserved in Washington county.

*The facts and questions involved, fully appear in the [496 opinion of the court.

A. & W. S. Nye, for plaintiff.

Goddard, Whittlesey, Towne & Erwat, for defendant.

RANNEY, J., delivered the opinion of the court.

The lessors of the plaintiff are the heirs at law of Jeremiah Sheldon, who died seized of the lands in controversy, and their title is conceded to be perfect, unless it has been divested by a sale made by his administrators, under which the defendant claims title. By the agreed statement of facts, it appears that the widow, Olive Sheldon and Israel Sheldon, a brother of the decedent, were duly appointed and qualified to administer upon his estate; and at the April term of the court of common pleas for Washington county, for the year 1829, presented their petition for leave to sell lands to pay the debts of the estate. It particularly describes all the lands of which the intestate died seized, alleges a deficiency of personal assets to the amount of \$363.16, exclusive of expenses, and prays that the dower estate of the widow may be set off, that they may be appraised, and that leave may be given to sell two of the tracts not embracing the lands now in dispute. To this petition the children of Jeremiah Sheldon, the present lessors of the plaintiff, were made parties defendant. They were then infants, the eldest being but five years of age. No service of process was made upon either of them, but the court appointed their great uncle, Philip Cole, their guardian *ad litem*, and ordered that a citation issue to him, returnable at the next term, to show cause, if any he had, on behalf of the minors, why the prayer of the petition should not be granted. At the same time freeholders were appointed, who assigned the widow's dower, and made an appraisement of all the lands described in the petition. At the next term, the sheriff returned the citation duly served on the guardian *ad litem*, and the freeholders returned the assignment of dower and *appraise- [497 ment; and thereupon the court proceeded to order the administrators to make sale of the two parcels of land as prayed in the petition, and to make return thereof at the next term. No proceedings appear to have been had under this order; and at the October term, 1829, a further order was made that the administrators "sell all, or

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as much of the lands in the petition described, which have been appraised, and the appraisement returned to this court at a former term, as will pay all the just debts of said decedent's estate." Under this last order, the administrators, at the April term, 1830, returned a sale of the lands in dispute to Andrew McConnell, for the sum of \$567.50, which being examined by the court, and found correct, was confirmed, and a deed ordered upon payment of the purchase money. It further appears that on the 15th day of September, 1829, and while the petition was pending, the administrator and administratrix intermarried, and it is agreed that McConnell, the nominal purchaser, was at the time an infant, paid no part of the purchase money, but bought the land and received the conveyance for the mere purpose of transmitting the title to Israel Sheldon, the administrator; and on the same day he received the deed from the administrators (August 23, 1830), and while yet an infant, made a conveyance to him. On the 3d of December, 1833, Israel Sheldon conveyed to Wm. Fleming; and the latter, on the 15th of January, 1834, conveyed to the present defendant, who is not shown to have had any notice of the infancy of McConnell, or the circumstances attending the sale and conveyance to him. A short time before the commencement of this suit, and more than twenty years after his first deed, McConnell made a deed for the premises to the lessors of the plaintiff.

Upon this state of facts, the plaintiff's counsel insist that the court of common pleas, in the exercise of the powers invoked in this and similar cases, is not to be treated as a court of general common-law and chancery jurisdiction, but as a court of special and limited authority conferred by statute; and that all the 498] conditions and limitations prescribed *by law as essential to the exercise of its powers, must appear affirmatively from the record of its proceedings, without the aid of presumption or intendment, to have been complied with and regarded, or they may be collaterally impeached and treated as a nullity. That the record relied upon by the defendant fails to show the existence of many facts indispensable to the jurisdiction of the court; the petition did not ask for authority to sell the lands now in controversy, and there was, therefore, in respect to them, in effect, no petition; the heirs were never made parties by being brought into court, and an opportunity given them to defend their rights; no deficiency of the personal assets appears to have been judicially

ascertained, and, therefore, no necessity for the sale of real estate was shown, and that, in proceeding to order a sale without the existence of these essential prerequisites to its authority, as well as in delegating to the personal representatives, the discretion to determine what lands should be sold, and in allowing more to be sold than was necessary to meet the alleged deficiency of the personal estate, the court exceeded its jurisdiction, and its order was wholly inoperative to transfer or affect the title to the premises now in dispute.

But if these proceedings can not be impeached, it is still claimed, that as McConnell was an infant when he conveyed to Israel Sheldon, his second deed, made since arriving at full age, must be held a disaffirmance of the first, and that in this manner, if in no other, the lessors of the plaintiff are invested with the legal title.

I. A settled axiom of the law furnishes the governing principles by which these proceedings are to be tested. If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous its proceedings may have been; its final order can not be regarded as a nullity, and can not, therefore, be collaterally impeached. On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct, and precisely certain, in point of *form, its record may appear; its judgment is void to [499 every intent, and for every purpose, and must be so declared by every court in which it is presented. In the one case, the court is invested with the power to determine the rights of the parties, and no irregularity or error in the execution of the power, can prevent its judgment, while it stands unreversed, from disposing of such rights as fall within the legitimate scope of its adjudication; while in the other, its authority is wholly usurped, and its judgments and orders the exercise of arbitrary power under the forms, but without the sanction, of law. The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained. When these appear, the jurisdiction

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has attached; the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally in question. *United States v. Arredondo*, 6 Pet. 709; *Rhode Island v. Massachusetts*, 12 Pet. 718.

We wholly dissent from the position taken in argument, that the jurisdiction of the court, or the effect of its final order, can be made to depend upon the records disclosing such a state of facts to have been shown in evidence, as to warrant the exercise of its authority. To adopt the language of the court, in answer to the same position, in *Voorhes v. The United States Bank*, 10 Pet. 473: "We can not hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority too well and long settled to 500] be questioned." *It was distinctly repudiated in the early case of *Ludlow's Heirs v. Johnston*, 3 Ohio, 560; and has been no less positively denied in every subsequent case, including *Adams v. Jeffries*, 12 Ohio, 253. The tribunal in which these proceedings were had, was a court of record, of general common-law and chancery jurisdiction; and while it is true, that in the exercise of this particular authority, it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered, that it was the tribunal created by the constitution, with exclusive jurisdiction over probate and testamentary matters, and had no one single characteristic of those inferior courts and commissions, to which the rule insisted upon has been applied by the English and American courts. All its proceedings are recorded, and constitute records, in the highest sense of the term, importing absolute verity, not to be impugned by averment or proof to the contrary, and conclusively binding the parties, and all who stand in privity with them. The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. *McCormick v. Sullivan*, 10 Wheat. 199;

Griswold v. Sedwick, 1 Wend. 131; Baldwin v. Hale, 17 Johns, 272; Grignous' Lessee v. Astor, 2 How. 341; 2 Binn. 255; 4 Ib. 187.

Orphans' courts, and courts of probate, when constituted courts of record, have uniformly been held of the former description. Thompson v. Tolmie, 2 Pet. 165; Grignous' Lessee v. Astor, *supra*, 11 Serg. & Rawle, 429; 11 Mass. 227. In respect to them, when it appears that they have proceeded with jurisdiction over the subject-matter and the parties, we fully agree with the Supreme Court of Pennsylvania *in saying: "If the purchaser was responsible [501 for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men;" and with the Supreme Court of the United States, in affirming that the reasons upon which their decisions have rested, "Are founded on the oldest and most sacred principles of the common law. They are rules of property, on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own; and there are no judicial sales around which greater security ought to be placed, than those made of the estates of decedents, by order of those courts to whom the laws of the states confide full jurisdiction over the subjects."

The purchaser is bound to look no further back than the order of the court made in a proceeding which the law has empowered it to entertain, and with the proper parties, or subject-matter before it.

All else we are bound to presume in favor of its action; and neither in judgment of law, nor in fact, is it to be treated with the least distrust. The proper application of this principle disposes of all the exceptions taken to these proceedings, arising after the jurisdiction of the court should have attached. The petition distinctly alleged a deficiency of personal assets, and described the lands now in controversy as a part of the estate of the decedent. The court had full power over the whole, and its right and duty to order the sale of so much, and such part, as might be necessary to meet the deficiency was unquestionable, whether it was the part indicated by the administrators or not. We are bound to presume the court had good reasons for going beyond the lots indicated by them; but if we were put to discover the reason, it would be found in the fact that the appraised value of those lots amounted to but little, if any,

more than one-half the represented deficiency. The final order presupposes the existence of debts, and the want of personal property *to pay them, to have been shown to the satisfaction of the court; while the irregularity, if such it was, of not designating the particular tract to be sold, becomes wholly immaterial when it is remembered that no title passed by the sale alone, nor until the sale of the specific tract was judicially approved and a deed ordered.

As it is not denied that the court was invested with power to entertain the proceeding, and as the lands were situated within the limits of its jurisdiction, it only remains to consider whether notice to the heirs was indispensable to the jurisdiction of the court; and if so, whether such notice was substantially given. These questions can only be answered in the light of a proper construction of the act of February 11, 1824 (2 Chase's Stat. 1308), under which these proceedings were had. From a very early period in our history lands have been made assets, in the hands of executors and administrators, for the payment of debts; but at no time could they be converted into money for this purpose until the personal property was exhausted, nor without the special leave of the proper court of probate. Prior to the passage of the act of 1824, this leave was obtained upon the petition of the personal representatives showing a deficiency of personal assets. No parties defendant were required to be made, and the proceeding throughout was wholly *ex parte*, and strictly and technically *in rem*. That act effected no further change than to require "the person having the next estate of inheritance of the testator or intestate" to be made defendant to the petition. What effect did this have upon the proceeding? Did it make it an adversary proceeding *in personam*, in such sense as to make actual notice to the heir indispensable to the jurisdiction of the court? These questions have not been answered in any of the cases that have been decided, and they are not of easy solution.

As the interests of the owner of the property sought to be appropriated are involved in either form of proceeding, neither is supposed to be pursued without notice to him. Proceedings *in rem* 503] have their own essential and distinguishing characteristics. They are usually brought to enforce some liability which the thing itself has incurred—the law treating the thing itself as the debtor or delinquent—or some specific lien upon it. The seizure of the thing, and taking it from the possession of the owner and into the

custody of the law, is deemed to be implied notice to him, and while the proceedings were confined to the pursuit of personal property, was often quite as effectual as actual notice by the service of a summons would have been. Other means for giving notice were usually prescribed, but a failure to comply with them only goes to the regularity of the proceeding, and has never been held necessary to give the court jurisdiction.

When the property charged with the liability is taken into the custody of the law, and brought within the power of the tribunal, and the judgment spends its whole force upon the property—creating no personal liability upon the owner—it has never been doubted that a judgment of condemnation was effectual to vest a perfect title in the purchaser, however irregularly or erroneously the court may have proceeded.

But when the liability is not upon the thing, and it is seized only to secure and satisfy such judgment as may be recovered against the owner, there is much difficulty in seeing how the proceeding can be said to be *in rem*, or how a judgment *in personam* can be rendered until the party has been personally brought into court by such notice as the law may have provided. I do not doubt that the validity of judgments strictly *in rem*, may, by positive provision of law, be made to depend upon the service of process or other notice upon the owner; but in the absence of such expressed legislative intention, the omission to serve the process, or give the notice, makes the proceeding only erroneous, but not void. The thing itself being in the custody of the law, and within the power of the court, is subject to its action, and effectually disposed of by its judgment. The proceeding authorized by the act of 1824, tested by its nature and essential qualities, would seem to be clearly enough a proceeding **in rem*. Upon the death of [504 the owner, the law charged his debts as a specific lien on all his property, real and personal, and held it subject to their payment. The legal title to the real estate, it is true, descended to the heir, but it descended to him subject to his paramount lien. The executor or administrator was a trustee alike for creditors and heir, and the order of sale upon his petition, operated on the estate, and not on the heir: and the purchaser, by operation of law, took the paramount title of the ancestor, and did not claim through or under the heir. 2 How. 338; 11 Serg. & Rawle, 430. The heir was required to be made a party to the proceeding, with a view to his

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having notice; but it is nowhere intimated that a failure to give the notice, should deprive the court of jurisdiction over the property. I am, therefore, strongly inclined to the opinion, that such an omission goes only to the regularity of the proceeding, and not to the jurisdiction of the court; and that its final order can only be set aside for irregularity, or reversed on error, and can not be treated as a nullity in a collateral action. The proceeding was distinctly declared to be *in rem*, in the case of Robb v. Irwin's Lessee, 15 Ohio, 698; and, although Read, J., in his dissenting opinion, characterizes it as a "nickname," in the case of Paine's Lessee v. Mooreland, 15 Ohio, 435, decided at the same term, he not only concurred with the court, but delivered their opinion in holding proceedings in attachment to be *in rem*, in which jurisdiction was acquired by the seizure of property; and that a judgment rendered without notice, could not be treated as a nullity, although such proceedings are founded upon no liability, or lien, resting upon the property itself, have adversary parties, and are consummated by a judgment *in personam*, and the statute expressly declaring that the suit shall be dismissed, at the cost of the plaintiff, if the notice is not given.

But it does not become necessary to place this case upon that ground, as the court are of the opinion that notice was given, in such manner 505] as substantially complied with the *law. This, we think, has been, in effect, settled for more than twenty years, by the court of last resort in the state. The statute provided for no particular form of process or mode of giving notice to the defendants. The necessity of giving any notice is only to be inferred from the fact that the heirs are required to be made defendants. This omission in the law had to be supplied by a course of practice in the several courts invested with the jurisdiction, and it is in no way surprising that entire uniformity was not secured. This fact demonstrates the propriety, and, indeed, the necessity, of upholding any form of notice that afforded a reasonable opportunity to the heirs to interpose their objections to the sale. In the case of minor heirs, the practice was general to serve the process upon the general guardian, or a guardian *ad litem*, or to permit an appearance without process by either. The correctness of this practice was first drawn in question in Ewing's Lessee v. Higby, 7 Ohio (pt. 1), 198. In that case the heirs were miners, and two of them were not named in the petition, but their guardian, during its pendency, entered their

appearance. The court held them bound by the order of sale, and decided that the proceeding could not be collaterally impeached. And in *Ewing v. Hollister*, 7 Ohio (pt. 2), 138, the same order was affirmed upon a writ of certiorari.

In *Robb v. Irwin's Lessee*, 15 Ohio, 689, no process was served or issued; but the court appointed a guardian *ad litem*, for the infant defendants, who appeared and answered. This was held sufficient to give the court jurisdiction, and the title of the purchaser was protected.

In *Snevely v. Lowe*, 18 Ohio, 368, one of the minor heirs was not made a party to the petition, nor was any process issued or served. A guardian *ad litem* was appointed, who filed an answer for the minor heirs, without specifying whether for those named in the petition alone, or for all the minor heirs of the decedent. But the court construed the answer to include them all, and held the proceedings effectual to transmit the title to the purchaser.

*Thus has the Supreme Court of the state, from the first to [506 the last, uniformly decided that an actual service of process upon the minor heir, was not necessary to give the court jurisdiction, or even to the regularity of the proceeding. That it was enough that a guardian, either specially appointed for the purpose, or having the care and custody of the infant's person and estate, was before the court when the order was made. That it was not even indispensable that the infant should be named as a party in the petition; and without directly affirming that the court could obtain jurisdiction without having him in some way before them, I must think that the case of *Snevely v. Lowe*, can be supported upon no other ground. In my opinion, it can not be upon the reasons assigned in the opinion.

These decisions have stood as the law of the state for more than twenty years. During all that time they have constituted rules of property, and upon the faith of them, men have invested their money. If ever an urgent case for the application of the maxim, *stare decisis*, existed, this is one. It is not enough that we should doubt their correctness, or that we should decide differently, if the question was now, for the first time presented. It must be made to appear clearly and unquestionably, that the rules of law have been violated, and the rights of the parties disregarded, before we could justify ourselves in questioning their authority. No such

case is made: the question was a doubtful one, and has been settled; and our plain duty is, to let it remain settled.

In no one of these cases has the court gone further than the Supreme Court of the United States, in *Grignous' Lessee v. Astor*, 2 How. 335, as will be seen by a particular examination of that case. I have not referred to the case of *Adams v. Jeffries*, 12 Ohio, 253, cited and relied upon by the plaintiff's counsel, because the order of sale there involved, was not made under the act of 1824, but under that of 1831, which specially provided the mode in which service should be made.

507] These principles seem to us, conclusively, to settle the *case in hand. In this case, the heirs were all made parties to the petition, and service of process was regularly made upon the guardian appointed for them. If the court had power to appoint them a guardian, it had power to bring him into court in this manner; and if he was in court when the order was made, the jurisdiction of the court over him, and those he represented, can not be questioned. It is true, he filed no answer, nor does the record show that he accepted the appointment; but the want of an answer could not affect the jurisdiction, and we are bound to presume the court were advised of his acceptance of the trust, before proceeding to make the final order in the case.

II. The plaintiff's remaining position may be disposed of in a few words.

A very salutary principle of law was certainly invaded, when the administrator indirectly purchased at his own sale. While the property remained in his hands, or in the hands of any purchaser from him with notice, the sale could have been set aside in chancery, at the election of the heirs, and the property again put up. But it is not claimed, and certainly could not be, that this prevented the legal title from passing to McConnell, and notwithstanding the infancy of McConnell, from him to Israel Sheldon. If the land had belonged to McConnell, it need not be doubted that he could have disaffirmed this conveyance, by making another deed to the lessors of the plaintiff, after arriving at full age. But, aside from the fact that the land had passed into the hands of a *bona fide* purchaser, long before this last deed was made, and making no account of his long acquiescence after arriving at majority, the law is perfectly settled, that an infant may, absolutely and irrevocably, execute a power either by absolute deed, or otherwise, as fully and

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effectually as an adult person. The authorities cited in argument are full to this purpose. The privileges which the law allows him, are given to protect his own interests, and not to enable him to disaffirm acts done for others, not affecting his own property. He had no interest in this property. *He was the mere conduit-pipe through which the title passed for the benefit of Sheldon, and having no interest, he had no right to disaffirm his acts. [508

Upon the whole case, we are of the opinion that judgment must be given for the defendant.

BARTLEY, J., dissented.

OHIO, FOR THE USE, ETC. v. MERRITT M. BEAM ET AL.

A clerical error in the entry of a judgment may be corrected, on motion, at a subsequent term.

MOTION for the correction of a clerical error in the entry of judgment at the last term.

THURMAN, C. J. The error exists as stated by counsel, and ought to be corrected. Let it be done.

JOSEPH P. KINSLEY v. THE STATE OF OHIO.

A writ of error can not be allowed before final judgment in the court below.

APPLICATION for a writ of error to a probate court.

THURMAN, C. J. There has been no final judgment in the court below. The application must therefore be refused. A writ of error does not lie until after final judgment. We had supposed that this was fully understood, but it seems not, as we have had several applications for such writs in cases in which no final judgment had been rendered.

Gerhard v. The State Benham v. Conklin.

WILLIAM GERHARD v. THE STATE OF OHIO.

When a writ of error is allowed by the Supreme Court, in term, returnable to a district court, it issues out of the Supreme Court, but when it is allowed by a judge in vacation, returnable as above, it issues from the clerk's office of the district court.

APPLICATION for writ of error.

509] *THURMAN, C. J. We grant the writ asked for, and order it to be made returnable to the district court of Montgomery county. As it is allowed by, it must be issued out of, this court. Were it allowed by a judge in vacation, and made returnable as above, it would issue from the clerk's office of the district court.

WILLIAM BENHAM v. WILLIAM B. CONKLIN.

When relief can be had in the district court, it should be sought there, unless there is some special and sufficient reason for coming into the Supreme Court.

THURMAN, C. J. This is an application for leave to file a petition in error to reverse a judgment of the common pleas. The applicant may file his petition in the district court, without leave, and there is no special reason why it should be filed in this court. Under these circumstances, we think it proper to refuse leave. When relief can be had in the district court, it should be sought there, unless there is some special and sufficient reason for coming into this court.

Leave refused.

THE STATE OF OHIO v. JOHN M. WEST, SAMUEL J. MCCLURE, AND
DAVID WEST

The provision in the act of March 8, 1831 (Swan, old ed. 652), that a recognizance minuted on the journal, "shall be considered as of record in such court, and proceeded on by process issuing out of said court, in the same manner as if such recognizance had been entered into before said court," did not require that an action of debt on such recognizance should be commenced by process issuing out of said court.

Sections 13, 14, 15, 16, of "an act concerning mesne process in civil and criminal cases" (Swan, old ed. 722), though not free from inaccuracies and obscurities, must be construed to contemplate the arrest of one not yet in custody, and to provide only for a recognizance to be taken by some officer "charged with the duty of arresting" a person indicted.

*The provision in the said section 16 for the signing and sealing of the [510 sort of recognizance therein contemplated, can not have the effect of requiring the signatures and seals of the parties to a recognizance taken by a judge or a court.

The last clause of the section of the act of March 7, 1831, conferring on a single judge the power to take bail, provides a convenient, but by no means necessary, mode of bringing the prisoner before him. The warrant for that purpose is not essential to his jurisdiction; if the sheriff voluntarily produce the prisoner, the whole object of the statute is accomplished.

No transcript need accompany a recognizance taken by a judge. The recognizance itself is a record, and a full one, if it is what the law requires. Sec. 4 of the act of 1848, 46 Ohio L. 95, explained.

Nor is the indorsement, by clerk or prosecuting attorney, of the time of filing the recognizance, essential to its validity, or to its becoming a record. The object of requiring that indorsement is merely to cut off the fees of any officer who may delay or neglect his duty in returning the recognizance.

Under the act of 1848 (cited), the recognizance becomes a record in contemplation of law, when the indorsement of its forfeiture is made by the clerk.

An acknowledgment, signed and sealed by the accused and two others, at the foot of which the judge wrote the words "attested and approved," was not a recognizance, but was unauthorized and void.

Where no discharge followed the taking of such a paper, although it was filed, and the judge, disregarding that acknowledgment, proceeded to take a recognizance in form, the latter was not invalidated by the mistake or inadvertence of the judge in taking and filing the former.

An associate judge was confined to the statutory enumerations of cases in which he might let to bail. Unless he acted on habeas corpus, or on surrender of the principal by bail, his jurisdiction was limited by the act of March 7, 1831. Swan (old ed.), 727. He could only let to bail when the accused was confined on the mittimus of a judge or justice of the peace, or under a capias on indictment.

The State v. West et al.

DEBT. The cause was reserved in the district court of Clark county, on the pleadings. These are stated in the opinion of the court.

Hinkle & Shellabarger, and Vinal, for the state.

S. & R. Mason, and Swan & Andrews, for defendants.

WARDEN, J. The plaintiff declares on what purports to be a recognizance, taken in Franklin county, by an associate judge, for 511] the appearance of John M. West in Franklin county common pleas, to answer an indictment for murder in the second degree.

A plea to the jurisdiction of the court in which the action was commenced first demands attention. It is insisted that the action is local. This point is made under a provision of the act "to regulate the practice of the judicial courts," passed March 8, 1831, that whenever a recognizance shall, as provided in that act, be returned to the court of common pleas, and minuted on the journal, it "shall be considered as of record in such court, and proceeded on by process, *issuing out of said court*, in the same manner as if such recognizance had been entered into before said court." But we can not construe this act to require that an action of debt on such recognizance should be commenced by process issuing out of said court. The word "shall," as here used, means nothing more than may. Power is thus conferred on the court to proceed on the recognizance by scire facias, as in other recognizances; and such an action as that here prosecuted, is neither allowed or forbidden by the act. Our law has set its face against local actions, and it would be strange if this statute had been designed to make an exception to the general rule on this subject. But, construing the act to refer only to scire facias, the provision is quite intelligible, such a writ always issuing out of the court where the record remains.

The demurrer to this plea is well taken.

Departing from the order in which the pleas present the other questions to be examined, we proceed according to what seems a more natural relation of the points made, as we have considered them.

The sixth plea, after averring that West was not arraigned at the term when the indictment was found, and that the court fixed the amount of bail at that time, continuing the cause to the succeeding term, alleges that no *capias* was issued on the indictment, and that

"the said supposed recognizance in said declaration mentioned, was not signed or sealed by the parties thereto." This plea is framed to meet *provisions of the statute, which we hold to have no [512 application to the taking of a recognizance by a single judge. Sections 13, 14, 15, 16, of "an act concerning meane process in civil cases," passed February 10, 1831 (Swan, old ed. 722), contain the provisions alluded to. Section 13 is not free from inaccuracy, and its mention of the mere failure of the state to arraign the prisoner, as an alternative in which, as though the accused were not yet arrested, an order must be made fixing the amount of bail to be taken when the accused shall be arrested, is one of the too many instances to be found of inconsistencies and obscurities in our statute law. But there can, we think, be no doubt that all the sections cited contemplate the arrest of one not yet in custody, and provide only for a recognizance to be taken by some officer "charged," in the language of the statute, "with the duty of arresting" the person indicted. As we shall see when we come to consider some of the other pleas, the whole regulation of bail taken by a judge differs from that applying to an arresting officer. Holding the statute of February 10, 1831, inapplicable to such a case as that supposed by the plea and declaration, we need only add that the singular provision in that act for the signing and sealing of a recognizance can not have the effect of requiring signatures and seals to a recognizance taken by a judge or a court.

The demurrer to this plea is good.

The fifth plea avers that in taking this recognizance the act of the jailer in taking the accused before the judge, and the act of the latter in admitting him to bail, were done in their individual and personal, not in their official capacity, no special warrant under the hand and seal of the judge having been issued to bring up the prisoner.

Was this necessary?

After defining the authority of a single judge to take bail, the act of March 7, 1831, provides a convenient but by no means necessary mode of bringing the prisoner before him. "For taking such bail," says the statute (Swan, old ed. 927), "the judge *may*, by his special warrant, under his hand and *seal, require the [513 sheriff or jailer to bring such accused person before him, at the courthouse of the proper county, at such time as in said warrant the judge may direct." While we must regard the section from which this clause is quoted as conferring the only authority there given to a single

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judge to take bail (except when he acted on habeas corpus, or on a surrender by bail), and must hold him strictly to the cases it mentions, we can not suppose the warrant to bring the prisoner before him essential to his jurisdiction. If the sheriff, without being so *required*, choose to take the accused before the judge, the whole object of the statute is accomplished.

This fifth plea can not be upheld.

Nor can the third plea be sustained. Of course the forwarding of the recognizance to the clerk or prosecuting attorney, is not what this plea means to deny. The presence of the recognizance when it was forfeited (a fact not questioned by the plea) is evidence of its having been forwarded. But the plea does mean to deny that a transcript of the proceedings of Judge Lazelle was forwarded with the recognizance by him taken. It is said "the transcript of his proceedings, with the recognizance, is necessary to show his authority and jurisdiction over the person and subject-matter. The statute is imperative in requiring such transcript *with* the recognizance." 46 Ohio L. 95. If we read the law rightly, this is not its true construction. The words are as follows: "That it shall be the duty of every judicial or other officer hereafter taking a recognizance binding any person to appear in any court of common pleas in this state, to answer to the charge of any crime or offense, to forward said recognizance, together with a transcript of his proceedings in said case, to the prosecuting attorney or clerk of said court, within twenty days after the same shall have been entered into, if so many days intervene between the taking of the recognizance and the sitting of said court. But if said recognizance shall be taken less 514] than twenty *days before the sitting of said court, then the same, together with said transcript, shall be returned to said prosecuting attorney or clerk, on or before the first day of the next term; or if taken in term time, the same shall be returned forthwith; and any officer failing to return any recognizance within the time herein prescribed, shall forfeit all fees accruing to him in the case in which said recognizance was taken; and it shall be the especial duty of the clerk to disallow and cast the same out of the bill of costs; and the officer receiving any recognizance shall immediately indorse thereon the date of his receiving the same, and subscribe his name thereto."

Taking this whole provision into one view, is it not plain that the transcript contemplated is that of a justice of the peace—of an

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examining magistrate—who has admitted the party examined to bail? The transcript is to be of the officer's "proceedings in said case." Now, what proceedings can the judge be required to record? The law governing his action is contained in a section of another statute, and the word transcript is nowhere mentioned in respect of a judge's taking recognizance, if this act of 1848 refers, as we think it does, to another and different officer, so far as it provides for the forwarding of a transcript. No good reason for requiring a transcript is or can be shown. The recognizance is itself a record, and a full one, if it is what the law requires.

We come now to examine the question raised by the seventh plea.

The facts set up or referred to by this plea are substantially as follows:

At the March term, 1850, of the court of common pleas of Franklin county, an indictment was found by the grand jury against John M. West, one of the above-named defendants, for murder in the second degree.

At the same term the court made an entry of the cause on their journal, continued the same, and ordered that West might be held to bail in the sum of \$3,000.

*Accordingly, on the 20th day of April, 1850, a recogni- [515] zance was taken and deposited with the clerk of said county, by John A. Lazelle, and filed by the clerk, as follows:

"We, John M. West, Samuel J. McClure, and David West, do hereby jointly and severally acknowledge ourselves to owe and be indebted unto the State of Ohio in the sum of three thousand dollars, which we and each of us acknowledge shall be made of our respective goods and chattels, lands, and estates, to and for the use of the said State of Ohio, if default be made in the condition following, to wit: That if the said John M. West shall personally be and appear before the court of common pleas of Franklin county, and State of Ohio, on the first day of the next term thereof, to answer unto the said State of Ohio, of charge of murder in the second degree, pending against him in said court; shall continue so to be and appear before the said court from day to day, abide the decision and sentence of the said court, and not depart the court without leave thereof, then this recognizance to be void, otherwise in full force and virtue in law.

"In testimony whereof, we have hereunto set our hands and seals, this 20th day of April, A. D. 1850.

JOHN M. WEST, [L. S.]
 "S. J. MCCLURE, [L. S.]
 "D. WEST. [L. S.]

"Attested and approved:

"JOHN A. LAZELLE, *Associate Judge.*"

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The paper upon which this suit is brought is as follows

"The State of Ohio, Franklin County, ss :

"Personally came before me, John A. Lazelle, one of the associate judges of the the court of common pleas of said county, John M. West, Samuel J. McClure, and David West, and jointly and severally acknowledge themselves to owe and be indebted unto the State of Ohio, in the sum of three thousand dollars, which they and each of them acknowledge shall be made and levied of their respective goods and chattels, lands, tenements, and estates, to and for the use of the said State of Ohio, if default be made in the condition, following, to wit: That if the said John M. West shall personally be and appear before the said court of common pleas of said Franklin county, on the first day of the next term thereof, to answer unto the said State of Ohio, of the charge of murder in the second degree, pending against him in said court; shall continue so to be and appear before said court from day to day, abide the decision and sentence of the said court, and not depart the court without leave thereof, then this recognizance to be void, otherwise in full force and virtue in law.

"Taken and acknowledged before me, witness, John A. Lazelle, associate judge of the said court of common pleas, this 20th day of April, A. D. 1850.

"JOHN A. LAZELLE,
"Associate Judge."

516] *This paper was never filed by the clerk. No memorandum of it, or its contents, or of the fact that it was filed or forfeited, appears from the journals of the court or otherwise. The only evidence that it was ever in the clerk's office, or that it ever possessed any official character or authenticity, is by an indorsement, as follows :

"This recognizance was duly forfeited in open court, on the third day of June, 1850.

"Attest:

L. HEYL, Clerk."

Was the supposed recognizance in the declaration invalid by reason of the taking of the acknowledgment, bond, or obligation, signed and sealed by these defendants, and filed with the clerk as a recognizance? In other words, was the first writing a valid recognizance? And did the powers of the judge exhaust themselves when he "attested and approved" it? We think not. The first paper was not a recognizance. It was a mere bond, such as the

judge had no power to take. All his authority to take bail is expressed by a provision of law in which he is empowered "to admit such person to bail, by recognizing such person," etc. Swan (old ed.), 727. The paper which he is to sign is a recognizance which, when it comes before the court of which he is a member, becomes completely what its name imports, an acknowledgment of record. All its solemnity and authenticity depend upon his own certificate, that the acknowledgment it sets forth was made openly before him by the parties in person. No parol proof can vary, enlarge, or explain it. Having a high legal character, it must be so framed as to be certain, and must show itself to have all the qualities which warrant courts in acting on it as a record, not to be contradicted. No such loose words, as "attested and approved," can give it these characteristics. It must not be left doubtful whether the attestation refers to its identity as a bond approved by the judge, and tendered to him (for aught that appears), by one of the parties, or by attorney; or, according to another construction, imports that he witnessed the signatures merely; or, according to still another [517] other reading, is meant to express that the judge not only took the acknowledgment, but witnessed its written evidence.

This first paper, then, was not a valid recognizance; and we have seen, if it was a mere bond, the judge could not take it, and it was a nullity. That it was filed with the clerk could not give it legal vitality. No discharge of the prisoner is averred to have followed it; and the plea does not deny the immediate execution of the writing sued on as a recognizance. It merely alleges that the prisoner, by giving what we have called a bond, "fully complied with the said order of said court in the premises, and was entitled to be discharged from custody; and at the time of the making of said supposed recognizance in the first and second counts of said declaration mentioned, the said West and said Samuel and David had then and theretofore signed, sealed, and delivered the said recognizance herein set forth, and the same was and had been attested, approved, and received in pursuance of law." Looking at the dates of the two papers, we find them the same. Taking this pleading most strongly against the pleader, as we must, it appears that, without any discharge of the prisoner, the judge, disregarding the invalid and wholly illegal paper he had taken, proceeded to take a good recognizance. If there were no

other objection to this recognizance, its sufficiency could not be questioned.

The demurrer to the seventh plea is well taken.

The objection to the recognizance set up by the first and second plea is, that the clerk "did not immediately, on receiving said supposed recognizance, or afterward, indorse thereon the date of his receiving the same, and subscribe his name thereto." A careful examination of the statute on which this objection is taken will show it to be unfounded. 46 Ohio L. 95. The whole purpose of section 4 of that act is to facilitate the business of the grand jury, the prosecuting attorney, and the court, by compelling the early forwarding of transcripts and recognizances. It defines not the requisites of a recognizance, but the duties of any officer charged or authorized to take it after it is taken, and constantly supposing 518] *its sufficiency. If those duties be neglected, no damage is done to the recognizance, but the officer loses his fees. Whether, as argued by one of the defendant's counsel, the act of 1831 is still so far in force as to require a memorandum of the recognizance on the journal in order to make a record of the recognizance, or that act is, in this particular, wholly superseded by the provisions of section 3 in the act of 1848, we are equally satisfied that the indorsement of the time of filing by the clerk or prosecuting attorney is merely directory; that it can give no greater certainty or solemnity to the paper, since it is not done in the presence or by order of the court, and in the case of the prosecuting attorney is not even the act of a certifying officer, or any one connected with the making or custody of the records; and that, as we have said, its only purpose is to cut off the fees of any officer who may unreasonably delay or neglect his duty in returning the recognizance.

It is said by one of the learned counsel for the defendants that the memorandum in the minute-book of recognizances returned to the court of common pleas, required to be made by the old law, statute of March 8, 1831 (Swan, old ed. 652), "is dispensed with by the law of 1848, and the loose and vague substitute is the indorsement on the back of the recognizance by the clerk, with his signature of the filing in his office by the officer. Even this counsel on the other side desire the court to dispense with, and test it as if the law did not require it to be done." This view of the case, and the law would respond to the questions as raised by the plea. But we have already shown why we can not consider the indorse-

ment here referred to as more than merely directory. Quite enough is provided by section 3 of the act of 1848 to show that the recognizance becomes a record in contemplation of law when the indorsement of its forfeiture is made by the clerk. "Whenever a recognizance in any criminal case shall be forfeited in the court of common pleas, whether taken before such court, before a judge of any court of this state, or before any justice of the peace; and whenever any *recognizance which shall have been declared [519] forfeited by a justice of the peace shall be returned into the court of common pleas, it shall not be necessary to make any minute of such forfeiture or of such return of such justice of the peace in the journal of the court; but it shall be sufficient for the clerk to make a memorandum of the date of such forfeiture in the court of common pleas, or of the date of the return by such justice of the peace of such forfeited recognizance into such court, as the case may be, upon the back of such recognizance, which memorandum shall be attested by the signature of such clerk; whereupon such recognizance, and the forfeiture of the same, shall be deemed of record in such court, and it shall not be necessary to enter upon the journal of the court any recognizance which shall be taken during the session of the same, but every such recognizance shall be deemed valid in law, if taken in open court, and attested by the clerk of such court."

Whether we can, in the state of these pleadings, make any use of the suggestion made in argument by another of the counsel for defendant, of a construction of this act quite opposite to that just noticed, may be questionable. It is, however, argued by the counsel alluded to, that if the indorsement by the clerk or prosecuting attorney, required by the fourth section of the act of 1848, is not necessary, still the following provision of the law of 1831 has not been complied with; and it is contended that it can stand with the act of 1848, and must be regarded as having been in force when the supposed recognizance was taken. The act of March 8, 1831, provides: "That whenever any recognizance shall be returned to any court of common pleas, by a justice of the peace or other officer authorized to take such recognizance, a memorandum thereof shall be entered in the minute-book of the court; whereupon the same shall be considered as of record in such court, and proceeded on by process issuing out of said court, in the same manner as if such recognizance had been entered into before such court; and the same

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recognizance shall be made out and recorded in full, in the book 520] *of records of said court, in the same manner as recognizances taken in such court."

Whether this single provision of an act, in other respects looking entirely to civil proceedings, ought, when its judicial construction first became necessary to have been applied to such recognizances as that here in question, might, perhaps, be doubted; but that construction has been given to it, and we can not say that it was wrong. But be that as it may, we are clearly of opinion that it was wholly superseded by the provision for the forfeiture of recognizances, contained in the section last read from the statute of 1848. And such, we find, was the legislative understanding. For on the 12th of March, 1853, the legislature restored the provision of the act of March 8, 1831, in the very words of the section which we have said was superseded by the act of 1848. And it is worthy of note that one of the learned counsel has, in a note to the act of March 12, 1853, contained in his excellent revision of the statutes, intimated the opinion that the new enactment supersedes all but the last four lines of the third section of the act of 1848—which four lines refer to a recognizance taken in open court. It is thus apparent that the learned counsel does not share the opinion of his colleague, expressed in the argument, that there was no repugnancy between the acts of 1831 and 1848, in the particular referred to. We quite agree with him that there was a legislative intention in 1848 to dispense with the memorandum on the journal; and might, if the question were here presented, adopt his suggestion that the provision in the act of 1848, for the forfeiture of recognizances, can not stand with the re-enactment of the old requirements of the law which the legislature thought proper in 1853. But we are not authorized by the record before us to examine this last question.

The only remaining plea which is demurred to is the fourth; and this we think is good. We are concluded by authority on this subject. The whole right of a single judge to take bail, when this 521] recognizance was taken, was contained *in the habeas corpus act, the section to which we have referred in the act of March 7, 1831, and the act relating to surrender by the bail. There is no question of a recognizance under a writ of habeas corpus made by these pleadings. Nor is it claimed in the declaration, or admitted by the plea, that there was any surrender by bail, so as to bring the case under the act of 1831. Swan (old ed.), 723. By the act

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of March 7, 1831, under which this recognizance was taken, the judge was only warranted to take a recognizance when the defendant was confined in jail under a magistrate's mittimus, or a capias issued on an indictment. The plea denies both these conditions on which his jurisdiction depended. And it can not be said that there is any contradiction of the record involved in such a plea. If there were, however, although the plea would be bad on special demurrer, as amounting only to the plea of *nul tiel record*, it would still be good on general demurrer. I am clearly of opinion that the imprisonment was not illegal. A right of arrest exists where there is well-grounded suspicions of felony, though no felony prove to have been committed—a right denied as to offenses of less magnitude, but as to the higher offenses essential to good order and the security of life—a right fully recognized by authorities, both English and American. If such a right exists when no felony exists or has been charged in any formal manner, *a fortiori* must a sheriff have a right to take and hold in custody one indicted of a murder. Such may have been the custody here, but it was not such as gave jurisdiction to recognize the prisoner to an associate judge. This fourth plea, therefore, is good.

Demurrer to the first, second, third, fifth, sixth, and seventh pleas sustained. Demurrer to the fourth plea overruled. Leave to amend declaration and reply to the fourth plea in ninety days. Leave to plead *de novo* within one hundred and twenty days, and every twentieth day thereafter to be a rule day, until issue joined; and cause remanded to the district court for further proceedings.

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He who would avail himself of the remedy of amercement, must bring himself both within the letter and spirit of the law.

The statute relating to amercements, being part of "an act regulating judgments and executions," passed March 1, 1831 (Swan, old ed. 484, sec. 32), expressly required the motion to amerce to be made in open court. Filing a paper in the clerk's office in vacation was not such motion.

Any but the slightest variance between the notice of the motion and the motion motion itself, will be fatal.

When a sheriff receives money, paid to discharge a levy on personal property
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after the return or return day of the writ, it may be a question whether his act was legal; but in strictness, such money is certainly not made upon the writ.

Under the statute governing this case, it may be that for a refusal to pay money thus made, there might be an amercement. But if so, it would be by virtue of the general language of the thirty-second section, to wit: "All moneys by him collected or received for the use of said party."

Where the goods levied on were sold under an agreement of the parties, and in a mode wholly unknown to the due execution of a fieri facias, the parties can not hold the sheriff *officially* responsible, and thereby charge his sureties, as well as himself, with his defaults. For his sureties may be made parties to a judgment of amercement, and upon a scire facias for that purpose, they are not permitted to set up as a defense any matter that occurred previous to the entering of the judgment. And this is an additional reason to those stated by Hitchcock, J., in *Duncan v. Drakely*, 10 Ohio, 47, why proceedings to amerce an officer are *strictissimi juris*. It is enough for sureties to be liable when the due execution of process is not interfered with by the party who complains.

CERTIORARI. The cause was reserved in the district court of Tuscarawas county.

The original cause was on a motion to amerce George N. Webb, sheriff of Stark county, in the common pleas of Tuscarawas county. The motion to amerce was filed on the 25th of March, 1850, and was as follows: Plaintiffs represent to the court that at the August term, A. D. 1848, of the court aforesaid, they recovered a judgment against Alexander Garnier, for the sum of two thousand four hundred and fifteen dollars and forty-eight cents, as will more fully appear [523] by the records of said court; that upon said judgment an execution was issued by the clerk of the said court, on the 26th day of August, A. D. 1848, directed to the sheriff of said Stark county, commanding him to cause to be levied of the goods and chattels in his bailiwick, of the said Alexander Garnier, said sum of money; and for want of goods and chattels that he cause the same to be levied of the lands and tenements in said bailiwick, of said Garnier, and to have said money before said court of common pleas on the first day of their next term, to render unto the said plaintiffs, and to have then and there this writ; which said execution was received by said George N. Webb, who was then sheriff of said county of Stark, on the 30th day of August, 1848; that said George N. Webb, after receiving said execution, received the full amount of money specified in said execution by virtue thereof, and that afterward, to wit, on the first day of April, 1849, and on the

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first day of May, 1849, and on divers days between the said first day of May and the first day of March, 1850, the plaintiffs, by their legally appointed agent and attorney, and by Lewis Schöfer, their attorney of record, demanded of said Webb said money by him collected on said execution, which he refused to pay over, and ever since, hitherto has neglected and refused, and still does neglect to pay over. The plaintiffs therefore pray that said George N. Webb, for his refusal to pay the said money when the same was demanded as aforesaid, may be amerced in the sum due the plaintiffs.

At the April term, 1850, the cause was continued, and at the four succeeding terms the cause was further continued. At the November term, 1851, the plaintiff filed the following notice of motion:

"Geo. N. Webb., Esq., Sheriff of Stark County, Ohio:

"This is to give you notice that on the first day of the next term of the court of common pleas of Tuscarawas county, Ohio, or so soon thereafter as counsel can be heard, we shall move court to amerce you for refusing to pay over, when demanded of you by Lewis Schöfer, our attorney of record, the money made by you on a certain writ of execution to you directed, which came into your hands to be executed in due form of law, for the sum of two thousand four hundred and thirteen dollars and five cents debt, one dollar damages, and *one dollar and forty-three cents costs; [524 making in the aggregate two thousand four hundred and fifteen dollars and fifty-eight cents, tested the 26th day of August, 1848, and issued at our instance from the clerk's office of said Tuscarawas court of common pleas against Alexander Garnier, upon a certain judgment of the said court in that behalf, rendered at the August term thereof, A. D. 1848, against said Garnier, in our favor.

"JOHN ANSPACH,

"WILLIAM ANSPACH,

"JACOB JACOBY,

"Partners by the name of Anspach, Brother & Co.

"By LEWIS SCHÖFER, their attorney."

This notice, the motion filed in the clerk's office, and the writ of *a. fa.* against Garnier, describe the persons composing the firm of Anspach, Brother & Co., as above, John Anspach, William Anspach, and Jacob Jacoby.

At the same term (Nov. 1851), appeared in open court, the plaintiffs, John Anspach, and Jacob Jacobs, partners, etc., by Griswold and Bingham, their attorneys, and moved the court for a judgment of amercement against the said George N. Webb, late sheriff of the county of Stark, for refusing to pay, etc., and there-

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upon the court amerced the defendant in the sum of \$2,368, and \$236.80, being ten per cent. penalty thereon.

Another variance is, that the motion filed, and notice, are for not paying money received on an execution issued on a judgment in an action of *debt*, for \$2,413.05 debt, \$1 damages, and \$1.43 costs, making in the aggregate \$2,415.48; and the writ given in evidence corresponds. But the motion, at the November term, 1851, upon which judgment was given, describes the writ as issued upon a judgment in another form of action, for \$2,413.05 damages, and \$2.43 costs.

The motion filed in the clerk's office is for not paying over the whole amount of the execution; the motion of November term, upon which judgment was given, is for not paying over a part of that amount.

From the bill of exceptions, it appears that on the trial, Schœfer, attorney for plaintiffs, testified that about the 29th or 30th of 525] August, 1848, the defendant received the execution *of the plaintiffs against Alexander Garnier; and a day or two afterward, he told witness that he had levied it on the goods in controversy. Upon these goods there was already a levy in favor of Walter F. Stone, for \$5,330, on a writ against Garnier from Summit county, which was levied on the 24th of July, 1848. The goods thus levied on amounted, by invoice, to about \$7,200. That the goods were sold by the sheriff, partly by private sale and partly by public sale, by arrangement with Garnier, to which the plaintiff in execution assented. That the sheriff commenced selling about the 1st of August, 1848, at private sale, and continued until the latter part of December following. That the sales were then suspended until about the middle of February, 1849, when the balance of the goods were sold at auction during the course of a few days. That the sheriff had the custody and control of the goods; and that he had a bond of indemnity made to him before he would levy the Stone execution; and that he made the sale at auction by his deputy. That the witness was attorney of record in both the executions, and that he assisted at the sale of the goods. That there was an arrangement between the plaintiffs, that if the goods did not bring enough, the money should be applied *pro rata*, otherwise they should be paid in order. In April, 1849, witness demanded the money of the sheriff; and in the fall of 1849 he told witness that he

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would not pay the balance over until the suit of Brown & Co., in trespass against him for the goods, was decided.

It further appeared that no vendis were issued, and that no return was ever made to the writs. There was some discrepancy as to whether the sales were made under the supervision and management of the plaintiff's attorneys. It appeared, however, that Schaefer, who was attorney of record for Anspach, Brother & Co., took a more active part in making sales than the sheriff. The gross amount of sales was about \$6,200; nearly enough to satisfy both executions. Out of this money the Stone execution was satisfied, and the residue the sheriff retained until the action of Brown & Co. should be determined. It does not appear that Webb [526 was indemnified by Anspach, Brother & Co. Nor does it appear that before the return day of Anspach, Brother & Co.'s writ, the proceeds of the sales exceeded the amount of the Stone execution.

M. Birchard, for plaintiff in certiorari.

J. A. Bingham, Griswold & Schaefer, for defendant.

THURMAN, C. J. The judgment must be reversed, for the following reasons:

I. The notice contemplated a motion to amerce to be made at the term next after it was served. But no motion was made at that term. Filing a paper in the clerk's office in vacation was not a motion. The statute expressly required the motion to be made "in open court." (Swan's Stat. old ed. 484, sec. 32.) It was not until the sixth term after the notice was given, and after a lapse of twenty months that such a motion was made.

II. The motion made in court was variant from the notice and unsupported by the execution given in evidence.

III. The motion was for refusing to pay money made *upon* the execution. But the money was not so made. First, because it was made after the writ had become *functus officio*, to wit: after the return day thereof. Possibly a sheriff may receive money, in discharge of a levy on personal property, after the return, or return day of the writ. But if he can, which we neither affirm nor deny, yet, in strictness, such money is not made upon the writ. Under the statute that governs this case, it may be that for a refusal to pay money thus made, there might have been an amercement. But if so, it would have been by virtue of the general language of the

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thirty-second section, to wit: "All moneys by him collected or received for the use of said party." A question is made, whether this section covers the case of a writ sent from one county to another, since that case is expressly provided for in a separate section, the thirty-fourth. But it matters not to which section the present 527] *proceeding is referred, for the notice and motion clearly confine it to money received upon the execution; and it was not so received. Secondly, the goods were sold under an agreement of the parties, and in a mode wholly unknown to the due execution of a *fieri facias*. Now we do not think that the parties to an execution can turn a sheriff into a merchant, with a corps of unofficial book-keepers and clerks, to keep a retail store for months, and sell at private sale as well as at auction, and upon credit as well as for cash, and when he has complied with their wishes turn him back into a sheriff, and hold him *officially* responsible, and thereby charge his sureties as well as himself with his defaults; for his sureties may be made parties to a judgment of amercement, and upon a *scire facias* for that purpose, they are not permitted to set up as a defense any matter that occurred previous to the entering of the judgment. Swan's Stat. (old ed.) 485, sec. 37. And this is an additional reason to those stated by Judge Hitchcock in *Duncan v. Drakely*, 10 Ohio, 47, 48, why proceedings to amerce an officer are *strictissimi juris*. It is enough for sureties to be liable when the due execution of process is not interfered with by the party who complains. It would be very unsafe if not unjust to let their liability be increased by private arrangements changing the due course of the law. For these reasons, as well as for those stated by the eminent judge above named, we fully agree with him that he who would avail himself of the remedy of amercement, "must bring himself both within the letter and spirit of the law." But neither letter nor spirit, in our opinion, sustains the judgment in this case.

Another point is urged with much force by the counsel for the plaintiff. He contends that a motion to amerce for not paying money made upon an execution, can not be sustained unless the execution has been returned. This proposition derives some support from the case of *Dawson v. Holcomb*, 1 Ohio, 275, and the provisions of the statute authorizing an amercement for failure to return a writ; but we are not prepared to express our opinion upon it, nor is it necessary to do so, the views already stated disposing of the case.

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Under the ordinary employment to collect a claim by suit, an attorney can not release or postpone the lien on lands resulting from the prosecution of the claim to judgment.

An honest belief that the release or postponement will be for the client's benefit can not supply the defect of authority to make such arrangement. The authority for that purpose must be express or implied beyond the mere retainer to sue and collect the claim.

Where, by the agreement of the attorney, without such particular authority, a prior was postponed to a junior lien, the holder of the junior lien could not, without constructive fraud, employ the same attorney to consummate the preference improperly given to his lien, by instituting a proceeding in chancery, in which the attorney appeared and answered for the holders of the postponed lien (who had no actual notice of the proceeding), and, admitting the priority of what was really the junior lien, procured a decree accordingly.

Nor, in the absence of a particular, express, or implied authority for that purpose, could the attorney for the prior judgment creditors, bind his clients by an agreement with A, that A should bid off the land under the execution, and that without any payment of money, the sale should be returned and confirmed, and a deed executed to A, who should afterward sell the lands for the best price that could be had, and apply the proceeds so as to postpone the lien of the judgment creditors to a junior lien as aforesaid.

The resort by the judgment creditors in such a case to an action at law in which they sought to recover the unpaid bid of A, to the extent allowed in the decree before mentioned, which stood in the way of a full recovery in that action, was no bar to a subsequent bill to impeach the said decree for fraud, and to obtain the complete satisfaction of the lien which had been improperly postponed.

In chancery. Reserved in Carroll county

The complainants filed their bill in the common pleas of Carroll county, August 12, 1844.

The bill alleges that complainants in said common pleas court, on the 15th June, 1841, recovered a judgment at law against William Hawke, for \$1,700.02 for damages, and costs, \$7.16; that at time of rendition of said judgment Hawke owned two quarter-sections of land in said county, to wit: N. E. quarter of section 19, and S. E. quarter of section 12; and that said judgment was the first lien thereon; that H. Griswold was the attorney of complainants, and

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529] took the judgment *for them; that on the 25th September, 1841, he sued out execution on said judgment, which was duly levied on said half-section, and returned; that a venditioni exponas afterward issued on same judgment, returnable to the June term, 1843, of said court of Carroll county, upon which the sheriff of said county duly sold said two quarters to defendant, Simeon Jennings, as follows: section 19 for \$2,134, and section 12 for \$1,076; and that at said June term, 1843, the sheriff made due return of said writ and sale, and returned "that he had the money in court;" that said common pleas, at said term, confirmed said sale, and ordered deed for said lands to Jennings, which deed was by the sheriff executed, etc.

That on 15th June, 1841, Hawke executed to Jennings a mortgage upon the same lands, to secure \$1,625 on one year, without interest; that Jennings paid nothing to the sheriff upon said sale; that Griswold, without authority, and "against the express refusal of complainants," agreed with Jennings to the effect that Jennings was to bid off the lands and not pay the sheriff; was to take deed and hold the lands in trust, to be by him, Jennings, sold for the purpose of obtaining money to pay off said complainants' judgment, and also the note and mortgage of Jennings.

The bill further alleges that Jennings, without consideration, transferred said note and mortgage to Webb, and that Griswold, as attorney for Webb, obtained judgment against Hawke at law in said common pleas of Carroll county, October term, 1842, on said note for \$1,722.18, and \$7.16, and levied said judgment immediately on said lands; and at same October term, 1842, Webb, by Griswold as his attorney, filed his bill of foreclosure upon said mortgage, and made Hawke and said Wilson, Vogle, and Seigers, and others defendants; but that said complainants, Wilson, Vogle, and Seigers, *were never* by subpoena, notice, or otherwise, made parties defendant to said bill of Webb, and never authorized Griswold to appear for them in said cause, and had no notice or knowledge of said bill of 530] Webb till after *June 1, 1844. That June term, 1843, a decree was had upon said bill in favor of Webb for \$1,800.29.

Complainants further aver that Jennings violated his agreement with Griswold, and on the 29th of February, 1844, sold said lands to Webb "*for hardly sufficient*" to cover said decree of Webb, and that Webb has paid nothing, and that his purchase "*is a sham.*" That Griswold falsely represented to complainants that Jennings'

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mortgage was the prior lien. That Griswold sold said N. E. quarter of section 19 to Henderson, for \$2,800, who has paid nothing—but holds under contract “A”—and that complainants are entitled to so much from Henderson upon said contract as will pay their judgment.

Complainants further allege that Griswold, by reason of his unskillfulness and negligence, and Jennings and Webb, by reason of their fraudulent acts, are jointly and severally liable to complainants for the amount of said judgment, and make them, together with Hawke and Henderson, defendants, and require each to answer on oath; and pray that they be decreed to pay judgment, and in default, that said lands be sold.

To this bill defendants, Jennings, Griswold, and Webb, demurred; and afterward complainants amended, and filed this amended bill, August term, 1846, which repeats the original bill, and sets forth the record of the proceedings on the bill of Webb v. Hawke, Wilson, Vogle et alias, and exhibits interrogatories to Jennings, Webb, and Griswold, touching all their acts upon the premises; requires them severally to *answer upon oath*; and prays “that the decree of Webb may be reviewed or reversed, or so much thereof as is erroneous, and that one or other of said defendants be decreed to pay complainants’ judgment; and that in default, said lands be decreed to sale for that purpose,” etc.

The defendants, Jennings and others, demurred also to the amended bill; the demurrers were overruled. Jennings, Webb, and Griswold severally answered the original and amended bills on oath, in which they admit the judgment of *complainants [531 against Hawke, and that Griswold was the attorney of record, but deny all the other material allegations of complainants’ bill so far as defendants are charged, etc., with fraud or liability.

Jennings admits that complainants took judgment against Hawke, June 15, 1841, and that Hawke owned the lands, but denies that this judgment was the first lien, avers that there were prior liens on same lands, for which sheriff of Carroll county held writs to amount of \$2,300; that at request of Griswold and Hawke, and to enable Hawke to pay these prior liens, on June 15, 1841, Jennings loaned Hawke \$1,450, at one year on twelve per cent. interest, and took from Hawke his note and mortgage on same lands for one year without interest, for \$1,625, with the express agreement of Griswold as complainants’ attorney, that he, Jennings, should have

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priority over complainants, on which condition he advanced the money and took the mortgage. The contract of Griswold is made an exhibit. That May 3, 1843, Griswold, as attorney for complainants, agreed in writing with Jennings, that Jennings might bid off the lands on complainants' writ, and should have the sale confirmed and take a deed, and Griswold would receipt for the money; and that Jennings, on or before March 1, 1844, should sell the lands at private sale or by auction, to the highest bidder, and pay: 1. Bank of Massillon; 2. Costs, taxes, and Webb's judgment; and last, (3.) Complainants' judgment, "if proceeds would go that far." Griswold's contract and receipt exhibited, "B. C."

That on the 29th February, 1844, after advertising in the Carroll Free Press, for several weeks, Jennings sold the lands in good faith to Webb for \$2,300, he being the highest bidder, and the sale being made at public auction. That he paid the Massillon judgment, \$188, and costs, and Webb's judgment; and balance, \$50, he paid to Griswold, as complainants' attorney, per his receipt. That he supposed and believed Griswold had full power to act; that the \$1,450 was advanced by Jennings to accommodate Griswold and [582] *his clients, complainants, and said sum applied by the sheriff to satisfy prior liens. That the money arising from the sale to Webb, was applied in accordance with Griswold's agreement, and with the decree in case of Webb, and that complainants, with full knowledge of all the facts, at April term, 1845, brought their suit at law against Jennings in assumpsit for money had and received, upon the same causes of action and by reason of the same matters set forth in their bill, and that at the August term, 1846, of the common pleas of Carroll county, complainants prosecuted their said action at law to final judgment, and recovered judgment against respondent Jennings, for \$105 damages, and \$106 costs, as appears of record, which judgment and costs Jennings fully paid, and insists upon the same as a bar to complainants' bill, etc.

This answer is verified as required, and exhibits the record of the judgment at law, and receipts of Belden, complainants' attorney of record, of payment of judgment, etc., which is admitted by complainants.

Webb answers on oath, denying all charges of fraud; avers that he bought the lands at public auction, in good faith, and paid Jennings the \$2,300, by releasing his judgment and decree of \$1,800.29, and paying balance in money. That he had no knowledge or be-

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lief that complainants had any interest in the lands; on the contrary, he believed that Jennings was the rightful owner, and held the valid title from the sheriff, as the record showed; and that he did not know that Jennings had not paid the sheriff. He also avers that he bought the note and mortgage from Jennings in good faith, and for full value, and paid him for the same before due, and employed Griswold to collect the same; but did not know what Griswold had really done, further than to take judgment for respondent Webb, etc. He denies that he confederated with Griswold or Jennings, as charged, to defraud complainants, and insists upon the sale under complainants' execution to Jennings, of the lands, and its confirmation, etc., as a satisfaction of complainants' judgment, *and an extinguishment of their lien on said lands, and also [533] upon their judgment at law against Jennings, as a bar, and the decree in his favor against complainants and Hawke, as a determination of complainants' rights. Webb also avers that after he purchased at auction, in 1844, at Griswold's request, he agreed, for an advance of \$250 upon the \$2,300 paid by him, to let complainants have said lands. That as he is advised, Griswold informed complainants of this agreement, and they assented to it. That Griswold, at request of said complainants, then sold the N. E. quarter of section 19 to Henderson, for \$2,800, being \$250 more than respondent was to receive for the half section, and thereby leaving the S. E. quarter of section 12 unincumbered, to secure to complainants the balance of their claim; and that complainants afterward refused to perform their agreement with Griswold, wherein they had authorized him for them, to contract with respondent, Webb, and with said Henderson as aforesaid; and that if they have lost anything thereby, it is their own act. Webb, in direct response to the bill, expressly avers "that at the time of said purchase (from Jennings) he had no knowledge or impression that his said purchase would in anywise affect the interest of said complainants, or that complainants had, or ever pretended to have, a lien prior to the lien of respondent." He also expressly avers that he made full payment to Jennings.

Griswold, on oath, avers the same facts as to prior liens on Hawke's land, by reason of other judgments and executions, as stated by Jennings. He also states, in response to the bill, that he did agree with Jennings, at the time he took complainants' judgment, that if he would advance money to Hawke, to enable

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him to extinguish these former liens, he would agree, for complainants, as their attorney, that Jennings should, by mortgage, have priority over complainants' judgment—honestly supposing it could make no difference to complainants whether the prior lien was by mortgage or by judgment and execution, and believing it was to complainants' interest to secure time for the sale of the lands. 534] *That he gave a memorandum in writing to Jennings to that effect. He also admits the second agreement in writing with Jennings, of May 3, 1843. He admits sale by Jennings to Webb, 29th February, 1844, for a sum only sufficient to pay Webb's judgment and prior incumbrances, and that Jennings advertised the time and place of sale in the Carroll Free Press. Admits that he wrote complainants that Jennings had prior lien. He further states, in response to the bill, "that after Jennings sold to Webb, he (Griswold) negotiated an arrangement with Webb to convey the lands to complainants on their paying to Webb his judgment and the prior liens (Massillon judgment and taxes), and an advance of \$200 or \$250. That he advised complainants of this, and they authorized respondent to close the arrangement and they would remit the amount upon conveyance being made to them;" that he did so contract with Webb for complainants, and that he also agreed with Henderson to let him have the N. E. quarter of section 19, at \$2,800. That complainants finally refused to approve this agreement—by means of which the contracts with Henderson and Webb were abandoned and canceled—and complainants lost a full security for their money. He also prays benefit of demurrer. In answer to amended bill, he states as in first answer; and further, that the judgment of complainants was by mistake taken for \$55.60 too much, and that of proceeds of sale made by Jennings to Webb, he received \$50, being balance after satisfying Webb's decree and prior liens. He admits that as attorney for Webb, he took judgment and decree against Hawke. He expressly denies all combination, but admits that he had no express authority from complainants to make said agreement with Jennings, that he acted upon his retainer to collect merely. Henderson answers that he had contracted with Griswold, but his contract was abandoned.

R. P. Spalding, for complainants.

J. A. Bingham, for defendants.

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*WARDEN, J. On the 15th day of June, 1841, the plaintiffs [535 recovered a judgment against Wm. Hawke for \$1,710.02 which operated as a lien on Hawke's lands, described in the bill, from June 14, the first day of the term.

On the same 15th day of June, a mortgage by Hawke to Simeon Jennings for about \$1,625 was signed, and Jennings was counting the money lent on it, and the sheriff, who held several executions against Hawke, was about to receive \$1,300 of the money lent to apply to those judgments, when Jennings, learning that another judgment had just been taken against Hawke, said he could not let the money go. To remove this difficulty, Hiram Griswold, who was the attorney of the present plaintiff, and took the judgment referred to, made the following agreement with Jennings:

"Know all men by these presents, that, whereas, we have this day taken judgment in the court of common pleas of Carroll county, Ohio, against Wm. Hawke, of said county, for one thousand seven hundred and ten dollars and three cents and costs; and, whereas, said Hawke has this day given to Simeon Jennings a mortgage on a half-section of land in said county to secure the payment of sixteen hundred and twenty-five dollars in one year without interest, which money has been this day advanced by said Jennings for the purpose of discharging liens on said lands; now this memorandum witnesseth, that in consideration of the premises, and of one dollar received of said Jennings, we hereby release to said Jennings, and to his heirs and assigns, any lien which we may have on said land by virtue of said judgment, hereby giving and allowing to him the preference over us in the liens on said land.

"WILSON, VOGLE & SIEGERS,

"By HIRAM GRISWOLD, *their Attorney.*"

On the faith of this arrangement, the loan was completed, the mortgage to Jennings was fully executed and delivered, and the money was applied by the sheriff to the extent of \$1,300 in the payment of several judgments against Hawke. The several executions in the hands of the sheriff were as follows:

- | | |
|--|----------|
| 1. One from said Carroll county, April 2, 1841, in favor of Hampton, Aten & Co. v. Wm. Hawke, for..... | \$513 09 |
| and costs..... | 9 83 |
| 2. One from Holmes county, March 12, 1841, in favor of Bancroft et al. v. Hawke, for..... | 260 40 |
| and costs..... | 8 32 |

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536] *3. One from Summit county, received April 27, 1841, in favor of Bancroft et al. v. Hawke, for.....	403 00
and costs.....	8 05
4. One received in fall of 1840 from said Carroll county, in favor of Bank of Massillon v. Hawke, for.....	932 40
and costs.....	12 44

The last mentioned execution was not, practically, a lien on Hawke's lands. It was levied on goods and chattels fully sufficient to meet its demand. The others were levied on a tract of about 145 acres, which was variously appraised at different times during the progress of the several proceedings before us, at sums which indicate that it would have been worth to complainants, had they chosen to purchase under their execution, at least the \$2,800, for which Griswold afterward contracted to sell it. Under the hammer this tract would probably have brought not less than \$2,500.

On the Hampton, Aten & Co. execution Hawke had paid all but a small balance, which the sheriff, when he testified in this case, could not precisely state. If we suppose that balance to have been \$100, we will be supported by the evidence. Adding this sum to the amount of the two Bancroft executions, we should have the following amounts to be made out of the tract of land mentioned, and another owned by Hawke, and worth, under the sheriff's hammer, say \$1,000, viz:

• The three executions levied before June term.....	\$ 779 97
Plaintiff's judgment.....	1,710 02
A second judgment in favor of Massillon Bank, taken at June term, 1841.....	1,134 20
Probable amount of costs if land were sold.....	100 00
Total.....	\$3,723 99

Now, even supposing Hawke to have had no other means of payment than such as would be the result of a sale of these lands, two considerations here present themselves. In the first place, the testimony shows clearly that the complainants themselves might well have purchased these tracts of land, the one for \$2,800, and the other for \$1,000, and thus saved themselves as well as paid the other liens. In the next place, they could not have lost more than one or two hundred dollars had the land been forced to sale without their bid. This is a liberal and fair calculation, considering all the facts, and especially these two: Mr. Griswold repeatedly as-

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sured his clients these lands were worth considerably more than we have here supposed, and he afterward contracted to sell the tract of one hundred and forty-five acres for \$2,800.

But the supposition that Hawke had no means other than these lands, does not consist with the evidence.

The loan of Jennings was, as he says, \$1,450; on which he secured the interest of 12 per centum for one year. After paying the first execution of the Massillon Bank, there would remain of this sum only \$505.16, to pay the \$779.77, for which the sheriff held three other executions against Hawke. Yet it appears that on the day after the Jennings loan, Hawke fully paid the execution, and must have otherwise procured the balance of \$274.81, after exhausting the amount of the money got from Jennings. True, the payment of the first Massillon Bank execution released the goods levied on under that execution; but, to say nothing of the improbability that, in the short time which there was between the release and the payment referred to, anything could have been realized by selling all or part of the goods so released, there is testimony to convince us that these goods remained in Hawke's possession till again subjected to levy. The amount made out of them on the second execution of the Massillon Bank, shows them to have been undiminished. They paid something like \$950 on the judgment in the case last mentioned. A passage in the testimony given in this cause by the sheriff who made the levies, is very satisfactory evidence that we are not mistaken in supposing Hawke to have had some other available means than those produced by the mortgage. The witness says: "As to the two executions of Bancroft & Co., I applied the remainder of the *balance of said sum of \$1,300, which, together with other means that Hawke paid me, and which he had raised by sale of wheat, etc., and other means, discharged said writs in full, on the 16th day of June, 1841. I know that Hawke had got money from different sources previous to and about that time."

It is thus quite apparent that all the probabilities were in favor of a full payment of all liens had these lands been put to sale; that some of the debts secured by the liens would probably have been discharged out of Hawke's other means; that in no case could the complainants have sustained any considerable loss; and that there could be no sort of propriety in diminishing Hawke's ability to pay by charging on the land large interest on a loan for a year. Yet, in the face of these facts, the attorney for Wilson, Vogle & Siegers

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agreed with Jennings, as we have seen, that "for the purpose of discharging liens on said lands," a preference might be given to the Jennings mortgage. This arrangement was nothing less than a release of the plaintiff's priority of lien. It was a discharge of their security to that extent; and whether fraudulent or not, was certainly done to the hurt of complainants. Without express or implied authority from his client other than that of his mere retainer to collect by suit, an attorney can not release a lien obtained by judgment, or discharge any like security resulting from his prosecution of the claim. A large number of authorities might be cited to sustain this proposition, and though many instances of a contrary opinion and action on the part of the profession may be furnished by the practice of attorneys, no authoritative decision has been found to break the chain of cases establishing the limitation we have supposed to the real power of an attorney under a common retainer. Had Mr. Griswold, then, any such express or implied authority outside of his retainer? We can not so find from the evidence. His own answer in this case limits his express authority to the usual employment of an attorney in such cases. He did not communicate to his client the knowledge of the manner in which, 539] as he told them, the Jennings mortgage *constituted a preferable lien. He spoke of it as a fact, but did not explain how it came to be a fact. Certainly no implied authority is shown for a proceeding so manifestly not in the plaintiffs' interest.

Without, therefore, imputing any actual fraud to Mr. Griswold, it is plain that the arrangement he made was not within his authority as an attorney, and can not be upheld.

On the 25th of September, 1841, an execution on the plaintiffs' judgment was levied on both of the tracts of land referred to. It is certain that, between the 15th of June and the 19th of July, Mr. Griswold might have caused a levy on the personal property before mentioned, out of which a large part of plaintiffs' judgment might have been made. The levy of the second Massillon Bank execution was not made till the last day mentioned. It is difficult to see why Mr. Griswold did not anticipate that levy, by a proceeding in favor of his own clients; but, however that may be, the plaintiffs' execution commenced proceedings which resulted in a sale to Jennings of both tracts of land, under a second agreement with Mr. Griswold, as the attorney of these complainants. This agreement was in writing, and provided that Jennings should bid two-thirds for

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the land on complainants' writ; that the sale should be confirmed and a deed should be executed to Jennings; that Griswold should receipt for the money as though paid, although it was not to be in fact paid, and that Jennings, on or before March 1, 1844, should sell the lands at private sale, or by auction, to the highest bidder, and pay the proceeds as follows: 1. To satisfy the second judgment of the Massillon Bank. 2. To discharge the judgment obtained on the mortgage note by Isaac Webb, a brother-in-law of Jennings, to whom the latter had assigned his claim. 3. To satisfy complainants' judgment, "if proceeds would go that far."

Meantime, however—that is to say, between the time of complainants' levy under their judgment and the said sale to Jennings, Mr. Griswold undertook the collection of the *Jennings mort- [540] gage for Isaac Webb, the assignee; and having taken judgment at law, immediately filed a bill in chancery in behalf of Webb, and as his solicitor, against Wilson, Vogle & Seigers, and other judgment creditors of Hawke, to settle the question of the priority of liens.

Of this proceeding, though the usual publication was made, Wilson, Vogle & Seigers had not actual notice, and they were not, while it lasted, informed of its character. This is evident from the letters of Griswold, and Griswold & Grant. But Mr. Griswold, under his employment to collect the judgment of complainants, appeared for them as defendants in the Webb chancery proceeding, answered for them, claiming a lien not prior, but subsequent to Webb's, and, as Webb's solicitor and theirs, caused a decree to be entered, finding the priority of Webb's mortgage claim to the judgment of complainants, and the priority of a balance on the second Massillon Bank judgment, over both the other liens.

It is singular that, in a letter written by Mr. Grant to complainants, under date of May 20, 1842, he says: "There are chancery proceedings against Hawke, out of which we expect to get something, and we think we may ultimately realize the whole claim, but some time will elapse, probably, before any of it will be paid." And, under date of June 13, 1842, the same gentleman wrote again, in answer to a letter inquiring as to the *nature* of the chancery proceedings. Mr. Grant makes some explanation on this subject in his letter. We are not sure that any testimony quite enables us to understand this feature of the case.

We know of no chancery proceedings having been instituted against Hawke at the date of these letters. The Webb proceeding

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was commenced in the succeeding October. We find in these letters no request of authority to act in any case pending in chancery, and the statement is such that no man to whom it was addressed could regard it as contemplating proceedings yet to be commenced, 541] and asking *authority to join in them. Nor can the letter of Mr. Griswold, under date of October 17, 1842, be regarded in any more favorable light as to authority to act in the Webb case. It runs as follows: "Mr. Hawke's land is not yet sold, and such is the scarcity of money that it is difficult to say when it will be. You have a lien on a body of land worth from \$4,000 to \$5,000, *subject to a prior mortgage incumbrance* of about \$1,750; but, as we have the collection of that also, *we are determined that the land shall not be sold for a less sum than will pay you.*"

We find in none of these letters an accurate account of the chancery proceeding. It nowhere appears that complainants were parties, or to be made such. That they were to get the *benefit* of chancery proceedings is intimated, and a lawyer would thus understand that the complainants *must* be made parties; but it can not be fairly said, that such would be the understanding of the merchants, who were Mr. Griswold's clients.

In this state of fact it is plain that the complainants never authorized or ratified the acts of Mr. Griswold in the chancery case, except so far as the retainer to collect their debt extended. We find it unnecessary to decide whether the authority thus conferred would warrant Mr. Griswold to enter the appearance of complainants in the Webb chancery proceedings, had they been commenced by an adversary attorney. Supposing that the appearance would in such case be good, and allowing that no actual fraud was committed either by Webb or by Griswold, we must still hold that Webb, charged as he is with the knowledge of all the facts relating to Griswold's unauthorized postponement of complainants' lien, could not employ Griswold as counsel in consummating the wrong already done, without subjecting himself and his decree to the usual consequences of a constructive fraud. It is clear that Webb must have known of the facts attending the postponement of complainants' lien. The record would show priority in complainants, and to avoid it, Webb would take from Jennings the paper executed by Griswold. Under these circumstances, we think, the decree procured 542] *by the employment and action of Mr. Griswold to which we have alluded, can not stand against this bill to impeach it.

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The lands were, after the date of the decree in favor of Webb, sold by Jennings at auction. Webb was the purchaser at \$2,300.

Disaffirming the unauthorized acts of their attorneys, the complainants brought suit at law against Jennings to recover the unpaid amount of his bid. In that suit, they could not avoid the decree finding Webb's priority; while, allowing that priority, there could not be a full recovery of the sum due complainants. But, for some cause which we can not ascertain, the recovery was for a less sum than, even allowing Webb's priority, would come to the plaintiffs if they recovered at all.

It is here objected, that these proceedings at law bar the complainants in a court of chancery. We do not so understand the law. The complainants were not making an election between two equal remedies, one at law, the other in chancery; they were proceeding at law, as far as they could, and they now come into chancery, as we think they lawfully may, to complete the remedy to which they are entitled.

Since, however, the complainants might have recovered in this action at law an amount equal to the balance of Jennings's bid, after paying the Massillon Bank and Webb, it is our opinion that they ought to be charged with that amount now; and that the lands in the ownership of Webb can be charged only with the difference between that amount, and the whole sum claimed by complainants, after deducting the payment made by Griswold, of fifty dollars, or thereabouts.

The objections to the bill now insisted on, do not appear to be such as to warrant us in dismissing it. It is substantially a bill to impeach the Webb decree for fraud.

A majority of the court is of opinion that the decree ought to be set aside, so far as Webb's priority is concerned, and that complainants should have such a decree as we have already intimated.

RANNEY, J., dissented.

543] *JACOB HOLTON v. ISAAC WADE AND WIFE.

A recognizance taken under the act of March 14, 1831, defining the duties of justices of the peace in civil cases, is sufficient, if taken in the form prescribed in the 111th section of that act; although neither the recognizance nor the transcript shows which party took the appeal.

ERROR to the common pleas of Pike county.

The court of common pleas dismissed the appeal from a justice's judgment, on the ground that the transcript does not show which of the parties took the appeal. The language of the transcript in this particular is as follows:

"In the action of Nancy Sole against Jacob Holton, I, Daniel Parker, acknowledge myself bail for —, the appellant, in the sum of one hundred dollars, to be levied of my goods and chattels, lands and tenements, in case the appellant shall be condemned in the action and shall fail to pay the condemnation money and costs that have accrued, or may accrue, in the court of common pleas.
(Signed), "DANIEL PARKER.

"Taken, signed, and acknowledged, on this 7th day of February, in the year 1851, before me. JOHN BRUMBEE, J. P."

Nancy has since intermarried with Isaac Wade.

W. H. Reed, for plaintiff in error.

RANNEY, J. The form of recognizance adopted by the justice in this case, is the one enacted by the legislature, and positively directed to be followed. It might have been made more perfect, by requiring the name of the party appealing to be inserted in the body of the recognizance; but the legislature has not seen fit to require it, and magistrates have not deemed it necessary to make the addition. To interfere, at this time, with this practice, would be productive of more mischief than could be balanced by any possible good likely to be accomplished.

The order of the common pleas, quashing the appeal, is reversed, and the cause remanded for further proceedings.

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M. K. conveyed to M. K., Jr., and G. W. S., certain of his lands, part of the consideration being an agreement by the grantees to pay the debts due by the grantor at the mills and distillery, upon the property conveyed. To secure performance of this agreement, they reconveyed by way of recorded mortgage, in which some debts were named, and others referred to, without description, as specified in a certain schedule, which last was never recorded or delivered for record. Subsequently, and before the bringing of suit to impeach certain conveyances of M. K. as in fraud of creditors, the grantees aforesaid, doing business as partners, mortgaged part of the lands to E. & S., to secure a loan; and to make the security perfect, M. K. executed a release of the lien of his mortgage on the part covered by the mortgage to

Jl. & S. Prior to the commencement of the suit before mentioned, some of the schedule creditors surrendered the evidence of their claims on M. K., and in lieu thereof, took the notes of M. K., Jr., and G. W. S., which remain unpaid. *Held*: 1. That the said schedule creditors could not impeach the conveyance to M. K., Jr., and G. W. S. Had the creditors retained the evidence of their claims upon M. K., the presumption would be that the notes of his grantees were collateral securities; but as they surrendered these evidence of indebtedness when they took the notes of third persons, the presumption is just the contrary. But, 2. It is fairly presumable that the surrender was made with an understanding that they were to have the benefit of the mortgage to M. K. That, under these circumstances, they are entitled to have all the securities for the payment of the money that M. K. had, is well settled. 3. It is a very serious question whether E. & S. were charged by the record of the mortgage with notice of the debts named in the unrecorded schedule. 4. The release of M. K. in favor of E. & S., was available for its purpose.

The same M. K., about the time of the conveyance sought to be impeached by his creditors, took into partnership his son J. K., who brought nothing into the partnership, and when it was dissolved, took nothing out. During the partnership, some of the complainants, who were creditors of M. K. at the date of his conveyance, took the notes of the firm of M. K. & Son for the amounts due them, some of which notes were subsequently, and after the dissolution of the firm, given up, and the notes of the father again taken in lieu thereof. *Held*, that under all the circumstances, this case is clearly distinguishable from that first stated, as to the effect of the creditors giving up the original notes. The transaction was intended simply as a renewal. It does not militate against this idea, that J. K. become bound as well as his father; for a note with security may as well be a renewal of a former note, as one without security.

*BILL in chancery from Clermont county.

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The following statement of part of the case, taken from the

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opinion of Caldwell, J., 2 Ohio St. 374, is here repeated, in order to a right understanding of the points decided at this time: "This is a bill filed by the creditors of Matthias Kugler, the principal object of which is to set aside certain conveyances made by him to his children, in March, 1847. At the time of these conveyances, Matthias Kugler was possessed of property (according to the estimate of the master to whom this case was referred), of the value of \$176,540.65, and was indebted to the amount of \$98,327.86. About \$146,000 of the property consisted of real estate, on which were several mills and distilleries. On the 13th of March, 1847, Matthias Kugler conveyed to different members of his family, what in the aggregate amounted to \$105,674.74. On the property thus conveyed, over forty thousand dollars of Kugler's indebtedness was secured by mortgage; the grantees took the property subject to the liquidation of these incumbrances. Schultz and Kugler, two of the grantees, also executed a mortgage to Matthias Kugler, sen., to secure the payment of about \$15,000 more of the indebtedness. The amount of Kugler's indebtedness intended to be secured by this family arrangement, amounted to about \$55,800. The amount of Kugler's indebtedness left wholly unprovided for by the arrangement, is stated by the master in the alternative; upon one hypothesis, it amounts to \$42,599.55, and on the other, to \$47,190.05.

"The master estimates the property retained by Kugler, at the time of the conveyances to his family, at \$70,837.93; the real estate he values at \$51,152, and the personalty at \$19,685.93. This estimate, the master reports, is made by setting down to Kugler's sole account, several tracts of land that had been conveyed to Kugler and wife, and stood in their names, and the half of which, it is contended, belonged to Mrs. Kugler's heirs. Deducting the one-half
546] of the value *of the property thus situated, the real estate retained by Kugler would amount, according to the master's estimate, to \$28,376, and the entire assets, real and personal, retained, to \$48,061.93. This latter the court regard as the true estimate. The property in the joint names of Kugler and wife, was property that formerly belonged to Mrs. Kugler's father, Christian Waldsmith. On the death of Christian Waldsmith, Mrs. Kugler, as heiress, became entitled to one-seventh. A petition was filed by some of the heirs for partition; Kugler and wife elected to take the property, and the sheriff conveyed it to them jointly, on Kugler giving bond to pay the other heirs. Although Kugler may have

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considered this property as his, and liable to the payment of his debts, yet Mrs. Kugler had the legal title to the one-half by the conveyance, and was the owner of one-seventh previous to that time. The title had remained in their joint names since 1817, and we think the one-half of the property belonged to Mrs. Kugler, and at her death descended to her heirs, and could in no way be considered as liable for Kugler's debts. Kugler continued, after the conveyances, to carry on an extensive business, until some time in 1849, when he failed; his mill and distillery were destroyed by fire, and he became largely insolvent."

Under the decree entered at December term, 1853, the cause was referred to a master. The nature of his report, and the questions arising upon it, sufficiently appear in the opinion of this court, which follows.

Fishback & Swing, Clark & Lewis, for complainants.

Fox & French, for defendants.

THURMAN, C. J. The main questions in this case, were decided by this court, at December term, 1853. See 2 OhioSt. 373. It was then decreed that certain conveyances of Matthias Kugler, sen., were void as against all persons who were his creditors at the date of their execution, and whose claims yet subsist, and the cause was referred to a master, to *ascertain who were such creditors, [547 and the amounts now due to them. The master has made his report, and several questions arise upon it.

One of the conveyances above mentioned was of certain lands, called "The East Liberty property," and was made to Matthias Kugler, Jun., and George W. Schultz. A part of the consideration for this conveyance, was an agreement by the grantees, to pay the debts due by the grantor at the mills and distillery, upon the property conveyed. To secure performance of this agreement they reconveyed the property, by way of mortgage, in which some of the debts were specifically named, and others merely referred to, without description, as specified in a certain schedule. This mortgage, with the exception of the schedule, was duly recorded; but the schedule has never been recorded or delivered to the recorder. Subsequently, and before the bringing of this suit, Schultz and young Kugler, doing business as partners under the firm name of Schultz & Kugler, mortgaged a portion of the

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property to Evans & Swift, to secure a loan; and to make the security perfect, M. Kugler, Sen., executed a release of the lien of his mortgage on the property covered by the mortgage of Evans & Swift. Under a decree of foreclosure and sale, rendered upon this latter mortgage since the commencement of this suit, the property embraced in it has been sold to Evans & Swift, the sale confirmed, and a deed made. It does not appear that Evans & Swift, when they took their mortgage, had any knowledge of the debts mentioned in the schedule referred to in the mortgage to M. Kugler, Sen. Nor does it appear that they had any knowledge of the facts, which impeach the conveyance aforesaid, to Schultz & Kugler.

Prior to the commencement of this suit, some of the schedule creditors surrendered the evidences of their claims upon M. Kugler, Sen., and, in lieu thereof, took the promissory notes of Schultz & Kugler, which remain unpaid.

In his answer and cross bill, M. Kugler, Sen., prays for a decree 548] of foreclosure and sale upon his mortgage, to which *no objection is made by Schultz & Kugler, but they insist that the decree shall not include the claims for which they gave their own notes, as aforesaid.

Evans & Swift also insist that it shall not embrace the lands covered by their mortgage.

The complainants insist that both these objections should be overruled.

On the part of Schultz & Kugler it is contended, that by surrendering the evidences of M. Kugler, Sen.'s, indebtedness, and taking, in lieu thereof, the notes of Schultz & Kugler, the persons doing so released M. Kugler, Sen., from all liability, and are consequently no longer his creditors. That, therefore, they have no claim to relief on the ground that his conveyance to Schultz & Kugler was fraudulent; the court having already decreed that that conveyance is good as against all but subsisting creditors. Nor have they, it is said, any rights by virtue of the mortgage to M. Kugler, Sen.; for that mortgage, it is argued, is a mere indemnity of the mortgagee against the debts therein specified or referred to; and, he having been discharged, as above, from the claims in question, the mortgage is *pro tanto* satisfied.

Of the correctness of so much of this argument as denies a right to impeach the conveyance to Schultz & Kugler, we have no

doubt. Had the creditors retained the evidences of their claims upon M. Kugler, Sen., the presumption would be that the notes of Schultz & Kugler were taken as collateral securities; but as they surrendered these evidences when they took the notes (and they were notes of third persons, it is to be remembered), the presumption is just the contrary.

But to the argument that denies any benefit from the mortgage to M. Kugler, Sen., we are by no means prepared to assent. For a valuable consideration received from him, Schultz & Kugler agreed to pay these debts. To secure their payment they gave this mortgage. By taking their notes, and discharging the elder Kugler, these creditors assented to the arrangement. And they, thereby, as before said, precluded themselves from impeaching his conveyance. *That this was done with an understanding [549] that they were to have the benefit of the mortgage, is fairly presumable. That, under these circumstances, they are entitled to have all the securities, for the payment of this money, that M. Kugler, Sen., had, is, we think, well settled. We can not regard the mortgage as a mere indemnity, in which no one but M. Kugler, Sen., could have any interest. It originated in an arrangement, one of whose objects was the payment of these debts. It was the understanding of the parties that they were to be paid; for honest men could have no other understanding. Upon their verbal promise to pay them, made to M. Kugler, Sen., the promissors probably became liable to actions by the creditors. If, for a valuable consideration, A promise B to pay C a sum of money, C may recover it in an action of assumpsit against A. 1 Chitty's Pl. 4-6. The mortgage to secure performance of the promise, ought (in favor of a creditor assenting to the arrangement and giving up his original claim) to be as liberally construed in equity as the promise itself.

We are therefore of opinion that these parties, who took the notes of Schultz & Kugler, have a right to be paid out of the proceeds to be realized from a sale of the mortgaged premises; and not only so, but that they should be first paid. For this is their only security, while the creditors who did not assent to the arrangement, and who are therefore not precluded from impeaching the conveyances of M. Kugler, Sen., have, in addition to this, other and ample securities.

We think the property mortgaged to Evans & Swift ought not

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to be included in the decree of sale. They are *bona fide* purchasers, for a valuable consideration, without notice of any of the equities of the complainants, except so far as they are affected by the record of the mortgage to M. Kugler, Sen. It is only then, by disregarding his release and giving his mortgage priority over theirs, that their property can be released. But, independent of the release, we are not quite sure that this can be done. The creditors who insist upon 550] including their property are schedule creditors. *But the schedule has never been recorded, and hence arises a very serious question, whether the record is any notice of the debts named in that instrument. That there may be a sufficient general description of debts in a mortgage, no one will doubt; but when there is no description at all, but only a reference to a schedule, it is well worthy of consideration, in the light of the authorities, whether the schedule must not be deemed and recorded as a part of the mortgage.

It is unnecessary, however, to decide this question, as the means to pay all the creditors who are entitled to payment by the terms of our former decree, will be quite sufficient without resorting to the property of Evans & Swift.

Another branch of the case remains to be disposed of. About the time M. Kugler, Sen., made his conveyances, he entered into a partnership with his son, Jacob Kugler, at a place called Germany. This partnership existed until February, 1848, when it was dissolved, and the business was subsequently continued by the father alone. It does not appear that young Kugler brought anything into the partnership, or that he took any thing out of it. For aught that we see, the firm was merely nominal.

During the existence of this partnership, some of the complainants, who were creditors of M. Kugler, Sen., at the date of his conveyances, took the notes of the firm of Kugler & Son, for the amounts due them, some of which notes were subsequently, and after the dissolution of the firm, given up, and notes of the old gentleman again taken in lieu thereof.

A question is now made, whether the debts, due by M. Kugler, Sen., at the date of his conveyances, were discharged by the taking of the notes of Kugler & Son, and much stress is laid upon the fact that the original evidences of indebtedness were probably surrendered when the new notes were given.

Under all the circumstances, we think this question must be an-

swered in the negative. We think the transaction was intended simply as a renewal. It does not militate against *this idea [551 that Jacob Kugler became bound as well as his father; for a note with security may as well be a renewal of a former note as one without security.

This case is very different from that at East Liberty. There, there was no attempt to retain the liability of M. Kugler, Sen. He was no party to the paper of Schultz & Kugler that was taken in lieu of his. But here his liability never ceased. The only change made was in the *evidences* of indebtedness, and by the addition of another promisor.

Upon the whole, we are of opinion that the claim of these complainants is not prejudiced by their having taken the new notes.

ROBINSON ET AL. v. FIFE ET AL.

Where a mortgage is given by the vendee of land to the vendor, to secure payment of the purchase money, the mortgagor has the same time in which to redeem, that he would have were the mortgage given upon any other consideration.

Although, strictly speaking, there is no statute of limitations applicable to the right to redeem mortgaged premises in the possession of the mortgagee, yet courts of equity, acting on the analogy of the statute, would hold such right barred after a lapse of twenty-one years, where the mortgagee had, during all that time, held possession adversely to the mortgagor, and claiming to hold, not as mortgagor, but as owner. But he must hold the possession in such manner, that if the legal title and right of possession had been in the mortgagor, the latter would have been barred of an action of ejectment.

It is not the possession merely, but the nature of that possession, which operates in equity as a bar to redemption. So long as the mortgagee admits, or by his acts shows, that he holds as mortgagee, and not by any other right, time does not begin to run against the right to redeem. Thus, where the mortgagee, within twenty-one years before the filing of the bill to redeem, took a judgment for the mortgage debt, and filed a bill of foreclosure, the right of redemption is not barred.

A mortgagee brought ejectment on the mortgage against a purchaser from the mortgagor, and recovered. The defendant claimed the benefit of the occupying-claimant law, which was allowed, and valuations made pursuant to the statute. The plaintiff elected to take the value of the land, and

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tendered a deed. The defendant neither accepted the deed, nor paid the 552] money, and *nothing more was done under the act. *Held*, that these circumstances constituted no bar to the right to redeem.

The general rule is, that a mortgagor, or purchaser under him, seeking a redemption, must redeem the whole premises, the reason of which is, that the mortgagee will not be compelled to divide his security, and apportion his claim. But where the mortgagee has extinguished the right of redemption to a part of the premises, and become the absolute owner thereof, there may be a redemption of the other part; for in such a case the reason of the rule does not exist.

IN chancery. Reserved in Clinton county.
The case is stated in the opinion of the court.

J. Milton Williams, Wm. S. Mickle, and Swan & Andrews, for complainants.

George J. Smith, B. Hinkson, and P. B. Wilcox, for defendants.

KENNON, J. On the 24th of January, 1812, Mrs. Benson and her two daughters, Kitty and Alethea Moon, conveyed, in fee simple, to Samuel McCray, their undivided half of 6,000 acres of land in Clinton county, Ohio.

On the 25th of January, 1812, McCray gave back to them a mortgage to secure a balance of the consideration money, amounting to the sum of \$2,543, payable by installments in two, three, and four years, without interest. McCray and Daniels (who claimed to own the other undivided half of the 6,000 acres) made a partition of the land. Soon after this McCray commenced selling out the land conveyed to him, in small parcels, and before the month of March, 1814, had sold, or contracted to sell, to some eight or ten different persons, portions of the land; and among other purchasers was John Adamson, who, in January, 1814, purchased from McCray 350 acres, and received from McCray a conveyance thereof. In March, 1814, McCray died insolvent. In 1816 the whole mortgage money became due. In 1817 a scire facias was issued by the mortgagees against the administrators of McCray, and judgment rendered thereon in 1818. This judgment was afterward, in 1827, revived for about 553] \$5,400, *but nothing appears to have been made on the judgment. In 1821, John Adamson sold the 350 acres to Ezra Robinson, and executed to him a title bond therefor. Robinson went into possession, and paid Adamson for the land. In 1822 an action of

ejectment was brought by the mortgagees, placing their right of recovery on the mortgage. Ezra Robinson et al. were made defendants to the action. At the May term, 1822, the plaintiffs obtained judgment against Robinson et al., who at the same term made application to the court for the benefit of the occupying-claimant law. This application was sustained by the court, although opposed by the plaintiffs' counsel.

Commissioners were appointed, who reported the value of the tracts of land of each claimant, without the improvements, and also the value of the improvements. Robinson's 350 acres, without the improvements, were appraised at \$700, and the improvements at \$200.

At the August term, 1824, a final order was entered in the case, by the court, fixing a time within which the plaintiffs should make their election, either to pay the \$200, and take possession, or tender a deed for the land, and receive the \$700.

Within the time specified in the order, the plaintiffs having elected to convey to Robinson, deposited a deed for the land with the clerk of the court of common pleas of Clinton county.

Whether the plaintiffs in ejectment ever demanded the \$700, or actually made a tender of the deed to Robinson, does not appear very clearly. Robinson, however, never paid the money, and the plaintiffs in ejectment took possession of the land in 1826.

In 1830, Mrs. Benson died, leaving her daughters, Kitty and Alethea, her only children, heirs at law. In 1831, Alethea died, leaving her husband, William A. Skinner, and five children to survive her. In 1832, a bill was filed by James Fife and Kitty, his wife, formerly Kitty Moon, and William A. Skinner, against the heirs and representatives of McCray for the purpose of foreclosing the equity of *redemption to the lands described in the mort- [554]gage. In 1833, the amount found due on the mortgage being \$9,195.62, and the land, including the 350 acres claimed by the heirs of Robinson, being appraised at \$8,226, being less than the amount due, a strict foreclosure, without sale, was decreed by the court. In 1834, Fife and Skinner divided the land between them.

The original bill in this case was filed in May, 1846, and an amended bill filed, in 1848, by the heirs of Robinson et al. against Skinner, Fife and wife, et al., the object of which was to redeem the whole of the mortgaged premises, or at least the 350 acres claimed.

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by Robinson, and to compel the heirs of Adamson to release to complainants.

The bill and amended bill are both answered by Skinner, by Fife and wife, et al. Replications are filed, and testimony taken. It is claimed that the heirs of Robinson are not entitled to redeem the whole or any part of the mortgaged premises for five distinct reasons.

I. That the transaction is really nothing else than a purchase and sale of real estate, and is governed by the common rules applicable to vendor and purchaser.

II. That the complainants are perpetually barred by the proceeding under the occupying-claimant law.

III. That it is a case of gross staleness.

IV. That the statute of limitations is a bar

V. That more than one-half the land is clearly beyond redemption, and that the whole must be redeemed or none.

We have considered all these objections carefully, and have come to the conclusion that neither of them can avail the respondents.

As to the first objection, it does not appear very clearly how much McCray paid Mrs. Benson and her daughters at the date of the purchase of this land, but we are satisfied that more than one thousand dollars was in effect considered as received by them.

They executed a deed in fee to McCray, and about the same time 555] took from him a mortgage to secure the balance *of the purchase money, payable as follows: \$543.50 in two years, \$1,000 in three years, and \$1,000 in four years, without interest, making in all \$2,543.50.

That this was a contract between vendor and purchaser, as claimed by respondent's counsel, there can be no doubt. It was the mode adopted by the parties, to secure to the vendors the payment of the balance of the purchase money of the land. But the vendors and vendee had agreed that the fee should be conveyed to, and vested in, the vendee at the time of the purchase. So far as the title to the land is concerned, it is not an executory, but an executed contract. It is not an agreement to convey, but an actual conveyance. The parties have, by their own contract, for reasons which we can not now inquire into, placed themselves toward each other in the relation of mortgagor and mortgagee, with all the rights and remedies which pertain to them as such, and no other. No authority is found by counsel for respondents, which sustains

the doctrine that this bill must be regarded in the light of a bill for the specific performance of a contract, or, that if it had been filed by McCray, it would have been necessary for him to have averred and proved his readiness and willingness to pay the balance of the purchase money when it became due. To put such a construction upon the transaction would, in effect, be to make a new contract for the mortgagees, and to defeat the very object of the parties, in placing themselves in the relation of mortgagor and mortgagee.

McCray was seized in fee simple of the land by the act of the vendors, and on the next day the land was conveyed to the vendors by way of mortgage, to secure to them the payment of \$2,543.50, in four years, without interest; and we are unable to perceive that it makes any difference, either in reason or upon authority, whether this sum was a part of the purchase money, or any other just debt. It was secured by mortgage, and all the incidents of redemption and foreclosure were attached to it as much as to any other mortgage. The rights of the mortgagees were not increased, *nor were [556 the rights of the mortgagor diminished, because the mortgage was executed to secure the purchase money. It was a mortgage, and to be treated as such, in any court.

II. It is claimed that the complainants are perpetually barred, by the proceedings under the occupying-claimant law, and in argument it is said that it was so held by the court of common pleas, and also by the district court, before the prayer of the petition for a rehearing was granted. This point is much relied upon by the respondent's counsel, and deserves consideration.

At the May term, 1822, of the court of common pleas of Clinton county, the grantors to McCray recovered, in an action of ejectment against Ezra Robinson and others, claiming under McCray, judgment for the mortgaged premises. Ezra Robinson, the ancestor of complainants had, before that time, by title bond, acquired all the interest in equity of John Adamson to 350 acres of the mortgaged land, which Adamson had purchased from McCray, and for which he had McCray's deed. Robinson, among others, claimed the benefit of the act for the relief of occupying claimants, and his application was sustained by the court. The improvements on Robinson's 350 acres were appraised at \$200, and the land at \$700, and it was ordered by the court that the plaintiffs have the term of five months within which to make their election, either to pay

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Robinson the \$200, or to tender to Robinson a general warrantee deed, and in the event of tendering the deed, Robinson should be entitled to five months from the time of such tender to pay the said sum of \$700, the appraised value of the land.

This is the substance of the order of the court, although the order was made before the appraisement, and the amount to be paid depended on such appraisement, within the five months fixed by the court. The plaintiffs elected to make a deed, and did leave the deed with the clerk of the court of common pleas of Clinton county, but the money was not paid by Robinson, and the plaintiffs took 557] possession under *their judgment, and this failure to pay, on the part of Robinson, is considered a perpetual bar to his right to redeem. That Robinson, before the judgment in ejectment, had acquired such an interest in these 350 acres, as entitled him to redeem the premises, and remove the lien of the mortgage, can not be doubted. Did he lose that right by claiming the benefit of his improvement? is the question. It is very clear to us, that the plaintiffs in ejectment, sought a recovery of the possession of the premises, as mortgagees only; they claimed no higher or better title; they relied upon the mortgage alone as evidence of their title. They had sought to recover the money, secured by a scire facias, on the mortgage, and had failed; there was a breach of the condition of the mortgage, and they, as mortgagees, were, at law, entitled to recover and hold possession of the land, accounting for the rents and profits until the mortgage was satisfied. They claimed their rights as such, and had the judgment of the court in their favor.

Suppose this action of ejectment had been brought against McCray, the mortgagor, in his lifetime, after he failed to pay the mortgage money. That the amount due upon the mortgage, was \$1,000, and that it was borrowed money, and not the balance of the purchase money. That the land was worth \$10,000. That the improvements were worth \$200. That he and his counsel and the court were of opinion that the mortgagees had no right to take possession of the land until he had been paid for the improvements made after the execution of the mortgage. That he claimed that right. That the court had ordered the appraisement, and gave to the mortgagees the right, either to pay the \$200 or make a warrantee deed for the land, and if McCray did not, within five months pay to the mortgagees the sum of \$9,800. that the mortgagees might take

possession of the premises without paying the \$200. That McCray failed to pay the \$9,800, and the mortgagees took possession under their judgment, in ejectment. Under such circumstances, would either a court of law or equity, say the mortgagor had lost all title to his land, worth *\$10,000? Would his right of redemption [558 be forever lost? If he should pay the costs of ejectment, and tender to the mortgagees the next day after they had taken possession, the amount due upon the mortgage, would a court of equity hold him perpetually barred from redeeming the land? It seems to me no such construction can be placed on the act for the relief of occupying claimants in force at the time of the order of the court.

The language of the act is in these words, so far as the same relates to the neglect or refusal of the occupying claimant, to pay the value of the land without the improvement: "If the occupying claimant shall refuse, or neglect to pay to the successful claimant the value of the land without the improvement, so as aforesaid assessed, within such reasonable time as the court shall allow, then a writ of possession shall be issued in favor of the successful claimant." See 2 Chase's Stat., 1166.

The statute gave to the successful claimant the right to pay for the improvements, or take the value of the land without the improvements. If he failed to pay for the improvements, he could not take possession, but if he elected to take the value of the land without the improvements, and tendered a deed for the same to the occupying claimant, and he neglected or refused to pay, then the successful claimant was entitled to possession without paying for the improvements.

In the supposed case, therefore, if the action of ejectment had been brought against McCray, and he had claimed adversely to the plaintiffs, and had been allowed the benefit of the act, and had failed to pay the \$700, being the appraised value of the land, the only thing which the plaintiffs at that day could have done, would be to do exactly what they did do, take possession of the land.

But what title would they have acquired by taking possession? It appears to me that the question is easily answered. They would have taken possession under the judgment in ejectment, and would have had precisely the title which they *had at the time of [559 the recovery in ejectment, and no other or better title. They claimed title as mortgagees only, and would enter and hold as such.

The mortgagor would have the same right to redeem which he had before the deed was tendered and money refused.

There is nothing, therefore, in the order of the court before the deed was tendered, and the payment of the money refused, which in the least increases the rights of the plaintiffs in the action of ejectment, or which could have changed their title from that of mortgagees to a title in fee, free from the equity of redemption.

The plaintiffs in ejectment are in no better situation than if the action had been brought against McCray. Robinson had the same right to redeem that McCray had, and the plaintiffs had possession as mortgagees only.

Indeed, one action of ejectment and recovery by the plaintiff is no bar to an action being brought by the defendant in *any case*, and trying the title over again; much less could it be a bar in the supposed case, after payment of the mortgage money, merely on the ground that the mortgagor had in the first action claimed to hold adversely, and the mortgagee had claimed the right of possession, until, and only until, the mortgage was satisfied.

In determining this point, we mean to say only that in this proceeding under the occupying-claimant law, the plaintiffs acquired no better title than they had before the action was brought, and that the defendant lost no right of redemption which he had before that time, without at present saying anything of a subsequent adverse holding by the plaintiffs.

III. The third objection to a decree for complainants is that it is a case of gross staleness, and the fourth is that it is barred by the statute of limitations. These two objections, although far from being the same, may be considered together.

Ezra Robinson, as we understand the evidence, died in possession [560] of these 350 acres, early in the spring of 1826, *and the original bill was filed on the 18th of May, 1846, less than twenty-one years after the mortgagees took possession of the land. If we are right in our conclusion as to the effect of the application for the benefit of the occupying-claimant law, Ezra Robinson, at the time the mortgagees took possession, had an estate in the land, a right to redeem, which was not affected by that proceeding; an estate which descended to his heirs at law, and vested in them the same right of redemption which he himself had. Have they lost this right by the statute of limitations, by lapse of time, or staleness of the claim? Although, strictly speaking, there is no statute of limitations appli-

cable to the right to redeem mortgaged premises in the possession of the mortgagee, yet courts of equity, acting on the analogy of the statute of limitations, would hold such right barred after the lapse of twenty-one years, where the mortgagee had during all that time held possession adversely to the mortgagor, and claiming not to hold as mortgagee, but as owner; but he must hold the possession in such manner that if the *legal title* and *right of possession* had been in the mortgagor, he would have been barred of his action of ejectment at law. In this case twenty-one years had not elapsed from the time the respondents took possession until the filing of the original bill. The original bill was demurred to on the ground that complainants claimed to redeem only the 350 acres, and not the whole tract. This demurrer was sustained, and leave granted to the complainants to amend their bill, which was done in May, 1848, more than twenty-one years from the time the mortgagees took possession.

The court, in granting leave to amend, annexed to the leave the following conditions, which were placed on the journal of the court: "The question raised in the cause as a matter of defense, growing out of the statute of limitations, or the staleness of complainants' demand in the premises, the court do grant the complainants leave to amend as aforesaid, so as to prepare the cause for trial upon the merits, reserving, however, the said question so growing out of the *statute of limitations, or the staleness of complainants' de- [561] mand in the premises, the court do grant the complainants leave to amend as aforesaid, so as to prepare the cause for trial on the merits, reserving, however, the said question so growing out of the statute of limitations, or the staleness of complainants' demand for hearing and decree hereafter, and should the complainants' equity be at this time barred, and the effect of the amendment under leave of the court, should be such as to remove the bar, and should be so determined on the further hearing of the cause, then the complainants are to take nothing by this leave to amend, but the cause is to be dismissed in the same manner that it would have been under issue as it stood at the time of the filing of this decree." The amended bill prayed an account and a redemption of the whole of the mortgaged premises. We are of opinion that the claimants had a right in this case to redeem the 350 acres, and were not bound to redeem the whole, as will be hereafter stated; and that, therefore, the suit ought to be considered as commenced on the 18th of May, 1846;

but according to the view which we take of this question, it is wholly immaterial whether the bill shall be considered as filed in 1846 or in 1848. It is not the possession merely, but the nature of that possession, which operates in equity as a bar to the redemption by the mortgagor, or those claiming title under him. So long as the mortgagees admit that they hold as mortgagees, or by their acts show that they hold as such, and not by any other right, time does not begin to run against the right to redeem.

Any deliberate act done, or acknowledgment by the mortgagee or mortgagor while in possession of the premises, evincing the existence of the mortgage, will save the rights of the mortgagee on the one hand to foreclose, and of the mortgagor on the other to redeem.

The law is thus stated in one case: Any deliberate act of the mortgagee, done within twenty years, by which he recognizes the existence of the mortgage as such, will prevent the right of redemption from being barred. Thus, when twenty-three years after the date of the mortgage the mortgagee made a will, devising that in case of redemption the mortgage money should go in a certain way: held, that the heirs of the mortgagor might redeem in eighteen years after the date of the will.

The authorities are numerous and conclusive, that any deliberate act done by the mortgagee in possession, evincing the existence of the mortgage as such, and that he holds possession by virtue of the mortgage only, will prevent the equitable bar.

In this case, the mortgagees and those claiming under the mortgage have done no one act, until 1833, evincing anything else than that they held as mortgagees. In 1818 they pursue the statutory remedy by scire facias on the mortgage, and obtain judgment. In 1822 they bring the action of ejectment founded on the mortgage as such, and obtain the judgment of the court that as mortgagees they are entitled to possession of the land. In 1826 they take possession under that judgment—less than twenty-one years before the commencement of this suit. In 1827 they revive the judgment obtained on the scire facias, and take judgment for the amount of the original judgment, and interest. In 1833 (only thirteen years before the commencement of the suit in 1846, and fifteen before filing the amended bill) they take a decree of foreclosure, finding due them over \$9,000, including all the expenses of preserving their title to these lands as mortgagees, and claim by that deliberate act that

they hold as mortgagees, and that the whole of the mortgaged premises shall be subjected as such to the payment of the mortgage money. It is not easy to see how a more definite and deliberate act, acknowledging that they held as mortgagees the whole of this land, including the 350 acres, could have been done than is here shown. They were in possession as such. They go further, and procure a strict foreclosure, and take on that foreclosure these 350 acres, which they held in possession, in part satisfaction of the mortgage money.

They knew from the very evidence of title which Robinson produced *on the trial of the action of ejectment, and on his ap- [568] plication for the benefit of the occupying-claimant law, that he had an estate in the land, that he had a right of redemption; and they acknowledge by their proceeding in 1833 that this same land is still subject to be redeemed; and the very object of the bill is to force that redemption, or if not redeemed, that that right of redemption shall be forever after foreclosed. The statute of limitations, therefore, did not in equity commence to run until 1833, and forms no bar to the right to redeem.

This bill in chancery to foreclose, however, was prosecuted in the name of Fife and wife, and of Skinner, the husband of the deceased sister of Mrs. Fife. Mrs. Skinner's children were not parties to the bill, nor were any others than the heirs and representatives of McCray made defendants to the bill. The heirs of Robinson, the present complainant, were not parties, and were not therefore bound by the decree.

It must be remembered that the condition of the mortgage was to pay to Mrs. Benson and her two daughters, jointly, the \$2,500 secured by the mortgage; and there can be but little doubt that McCray, after the death of Mrs. Benson, might have redeemed by paying to the surviving daughters. So, also, he might have paid to Mrs. Fife, after the death of Mrs. Skinner, who was the only surviving obligee or grantee in the mortgage. The heirs at law of Mrs. Skinner might have been made parties, but were not necessary parties to a bill to collect the mortgage money.

These heirs, however, so far as we know, were never in the actual possession of the mortgaged premises; and we do not see any bar which they could claim by virtue of possession or otherwise.

Robinson's heirs were not parties. They were necessary parties, and therefore were not bound by the decree; but although not par-

ties, the court will look to the acts and doings of those who filed the bill, and who had a right to do so, and who were in possession of 564] the mortgaged premises, *in order to determine whether they held adversely to the heirs of McCray or Robinson, or whether they held as mortgagees, acknowledging the right of the mortgagor, and those claiming under him to redeem. We are clearly of opinion that there was no adverse holding until after the decree of 1833. That, at the time of taking that decree, the heirs of Robinson held the equity of redemption in the land and estate, which descended to them from Ezra Robinson, and that since that time there is no such lapse of time or staleness of claim as ought to induce a court of equity to reject their claim.

If the court had come to the conclusion that the heirs of Robinson must redeem the whole or none, and we had found, as the fact appears to be, that numerous persons had made purchases from the mortgagees of parts of that tract of land, *bona fide*, without any actual knowledge of Robinson's claim, and had made valuable improvements under the eye of the heirs of Robinson, we might have been induced to consider as to these persons more carefully the staleness of this claim as against them. The 350 acres, however, are still in possession of those who are not purchasers. They are held by the heirs of Mrs. Skinner, one of the mortgagees.

It is said, however, and this is the fifth objection to a decree, that the heirs of Robinson must redeem the whole, or they can redeem no part of the mortgaged premises. This, as a general proposition, is undoubtedly true.

But what are the facts of this case? At the time of the decree of foreclosure, Robinson's heirs were the owners of 350 acres of the whole tract, and McCray's heirs of about 2,392 acres. To the land owned by McCray's heirs, the mortgagees extinguished the right of redemption by that decree, and the heirs of McCray became barred, being parties to the decree. The heirs of Robinson were not parties, and their right to redeem was not affected by the decree. It is admitted by the counsel for respondents that more than half the land can not now be redeemed; but if the whole of the land belonging, at the time of decree, to the heirs of McCray, 565] *was yet in the hands of the mortgagees, why could not Robinson's heirs redeem the 350 acres without being compelled to redeem the whole?

The right to claim that the whole, and not a part, shall be re-
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deemed, is a right which appertains to the mortgagees and not to the mortgagor. The reason of the rule is, that the mortgagees shall not be compelled to divide or apportion his security. The reason of the rule itself ceases in this case, when we see that the mortgagees here, by their own acts, extinguish the equity of redemption to all the land except the 350 acres owned by Robinson's heirs. They have made themselves the absolute owners of this land by their own acts, and have sold and disposed of a large amount of it to strangers, who have taken possession and improved the same. We see no want of equity in leaving the mortgagees in the position in which they have voluntarily placed themselves by their own decree, and consider them as the absolute owners of all the land except the 350 acres. The mortgagees having become the owners of the 2,392 acres, if the heirs of Robinson were to pay the whole of the mortgage debt, they would have a right to immediate reimbursement from the mortgagees, of so much thereof as the lands absolutely held by them ought to contribute to the redemption. This process would be a vain thing.

Being therefore of opinion that the 350 acres may be redeemed by the heirs of Robinson, we find that, before the decree of foreclosure, upward of 500 acres of the 3,000 acre tract had been sold for taxes, and that an action of ejectment having been brought, and recovery had, by the mortgagees, against one Gibson, the claimant under the tax sale, and an application made for the benefit of the occupying-claimant law, the mortgagees, a short time before the decree, conveyed said 500 and odd acres to Gibson, and received therefor the sum of \$1,623.17, of which no account was taken in the decree of foreclosure. That the decree should have found due the complainants the sum of \$7,572.45, instead of the sum of \$9,195.62. So far, therefore, as there is any evidence before us at this [566] time, we feel warranted in saying that the decree was for \$1, 623.17 too much. The whole of the land subject to be sold at the time of the decree (excluding the Gibson land) amounted to 2,742 acres, and was appraised, at that time, at three dollars per acre, making \$8,226. That the 350 acres owned by Robinson's heirs, and the 2,392 acres owned by McCray's heirs, were of about equal value, acre for acre; that the value of the 2,392 acres, to which the mortgagees obtained an absolute title by the decree, amounted, at three dollars per acre, to \$7,176, leaving \$396.45 as the sum which the Robinson's would have been bound to pay, at

the date of the decree of foreclosure, in order to redeem the 350 acres. For equity required that the land owned by McCray's heirs should be first resorted to, for the payment of the mortgage money, before resorting to the 350 acres owned by Robinson's heirs, and for which McCray had been fully paid. This last sum, therefore, with interest from the date of the decree of foreclosure, is the sum to be now paid by the heirs of Robinson, subject, however, to be increased or diminished by an account to be taken of the rents and profits, improvements and taxes of the 350 acres since the decree.

In stating the account, the master will state it in two aspects, one with rests made annually, and the other without any rests.

As to other parts of this case, we find that neither of the other parties to this proceeding, who claim the right to redeem parts of this land, have any rights, either as against the mortgagees or heirs of McCray; and that the heirs of Robinson have no claim in equity to redeem the other tract of land mentioned in the bill of complaint; and that the bill itself is not multifarious; that the heirs of Adamson are proper parties to the bill, not only for the purpose of settling the question as to whether the heirs of Robinson have the right of redemption, in the 350 acres, as against the heirs of Adamson, but also as against the mortgagees. A decree of reference may therefore be drawn accordingly.

567] *WARDEN, J. No view I can take of this case shows any equity on the part of the complainants. They ought to have a perfect equity, however, to be warranted in redeeming these lands. They ask, not the enforcement of a right to the possession of property of which some one has deprived them in mere wrong or fraud against them, but the allowance, by a court instituted to soften the severities of the law, of an *equity to redeem* that which has passed from them through their own default, or that of their ancestor. This court has refused at this term (*Fitch v. Huntington & McIntyre*, ante) even to restore to a party his strict legal right of being subjected to no judgment or execution save according to the laws and usages of the courts, unless he founds his claim to the enforcement of that right upon a strict performance of equity on his own part. How much stronger would be the position of the court if the thing demanded were, as it is here, a mere equity! The very notion of the estate called an equity of redemption, its name and

its history, all show that the redemptioner must be in a position, not to seize some harsh and technical advantage, but to prove himself worthy of regard in the courts, by doing justice which alone he is to receive. It is in the gratification of contemplating this offspring of equity that our law writers forget their gravity to exclaim: "Returning justice lifts aloft her scale." Whenever it would be unjust to allow redemption, no redemption can be *demand*ed. When the redemptioner can not take what he asks without doing injury for which he is fairly responsible, and which can not be redressed by him or by the court, he ought to be dismissed. I care not how his want of equity may be designated. Let it be said his words, his acts, or his silence, have equitably *estopped* him. Or, if some strict definition of estoppel forbid such an expression, let his case be considered as that of one who has *abandoned* his right, so that it would be like a *gift* if he should ever get it again. The change or acquisition of property, worked by judgment, challenged all the known designations of title, and found a *fit name in [568 an addition to the denominations already used when it was called *title by judgment*. Nay, this very estate now known as the *equity of redemption* added a new name to the body of legal nomenclature. Not the name by which it may be distinguished, but the substance of equity which supports it, gives that estate the high favor and countenance it has come to enjoy. "Once a mortgage, always a mortgage," is no ancient maxim; not half so old as that very *principle* of equity jurisprudence, "he who seeks equity must do equity" —or that kindred maxim, "he that hath committed inequity shall not have equity." In name and in nature, the equity of redemption is a graft on the law; and with this precedent of finding a new name for a new thing before us, we shall not have to hesitate long for a word to describe the case of one who has so behaved as to lose that equity.

But what must such behavior be? The answer must be various as the cases themselves. Take the instances whose hardship first led to the cautious promulgation of this new doctrine of mortgages. In one of them it is modestly and almost timidly said: "The court conceived, as it was observed in chancery, that the said lease being but a security, and the money paid, though not at the day, the lease ought not to be void in equity." *Emanuel College v. Evans*, 1 Rep. in Ch. 10. Now, if in all such cases the debtors had behaved so as to show that they never meant to pay the debt, or to

claim back the estate; if they had not been watchful and anxious, and only unfortunate, I doubt whether Sir Matthew Hale would ever have been betrayed into the complaint that by the growth of equity the heart of the common law was eaten out; for, coming into court, not only culprit but convict, by his own confession, of a great default, the mortgagor would always have been told that there was no room for him in a court of equity. He had, by his recklessness, committed inequity, he should not have equity; so would the chancellor have dismissed him. If the apparent value of the estate 569] even, had deceived the mortgagor into the belief that he would never desire its redemption, and he had left it to the mercy of the mortgagee without further care for its fate; or if the hopelessness of his pecuniary condition had led him to abandon all thought of redemption, and to show this abandonment in the whole of his words and actions, no claim he might afterward make would be respected in a court of equity.

For how stands this matter in the oracular books of the law? "As soon as the estate is created, the mortgagee may immediately enter on the lands, but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility, *at law*, of being afterward evicted by the mortgagor, to whom the land is now forever dead. But here again, the courts of equity interpose; and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses; for otherwise, in strictness of law, an estate worth £1,000, might be forfeited for non-payment of £100, or a less sum. This reasonable advantage allowed to mortgagors, is called the equity of redemption." 2 Bla. 169. This language of Blackstone is precisely such as one familiar with the history and real character of the estate might be expected to use, and it is full of suggestion. The thing spoken of is "allowed;" it is an "advantage;" it must be a "reasonable advantage;" it

has its origin in the cases of foolish or unfortunate *borrowers* on the one hand, and of hard and exacting *lenders* on the other; and it has great regard to the value of the estate as compared with the amount of the *loan. Now, while developments of the doctrine first taught on this subject, call for a few qualifications or additions to the language of Blackstone, it must be remembered that the estate itself is always an *equity*, or it is nothing. And, so understanding it, let us suppose a case like that now before this court, as presented to the chancellor who made the first step of innovation in this particular. Instead of the needy creditor as plaintiff, and the professional money-lender as his antagonist, let us put before that court parties such as those in this record; and let it be fancied that there were in England lands open as those here in question to the operations of the speculator, and valuable as these may have now become as a homestead or a favorite possession for any purpose. They are bought and mortgaged for the purchase money by one large speculator, and divided by many purchasers under him into as many tracts. The first speculator forfeits his estate at law, dies insolvent, and leaves his affairs in hopeless confusion. The purchasers under him are many, strangers to each other, and from the very nature and necessity of their condition, in some degree adventurers—or to use our American word, “speculators.” To think of redeeming the lands then, or thereafter, seems to be absurd, in view of their condition, and the present estimate of their market value. Catching at every advantage, real or apparent, allowed them by the law, the purchasers claim the benefit of some statute which they suppose to compensate them for their improvements. They will not redeem—they will get rid of their unfortunate purchase on the best terms they can make for themselves. Possession is abandoned—some depart to other scenes of adventure; some remain, and in the daily sight of their former possessions, behave as though they had lost all present interest and all expectancy in the lands. The mortgagees treat the lands as their own; they show that they so regard them. They become attached to what they deem their property. All parties show the same understanding in all their behavior. Years afterward, when it is no longer “reasonable” *that they should have such an [571 “advantage,” the heirs of one who has so abandoned his property, ask to be “allowed” to redeem the lands. Would not the English chancellor have told them they could not do equity at that late day,

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and that by reason of their carelessness they had lost all right before him? Would he have allowed them to redeem simply because twenty-one years had not elapsed? I think not. If this had been the case, in which the attempt was first made to set aside the forfeiture of estate and set up the equity of redemption, I fancy our jurisprudence would have been illustrated by no such title.

Counsel for complainants are certainly right when they say that "whether the mortgagor or mortgagee remain in possession of the property, he holds it subject to the payment of the mortgage claim, until it is extinguished, or their several possessory interests are ripened into absolute rights by lapse of time. The mortgagee has his right of foreclosure, the mortgagor his right of redemption. The latter must pay the claim; but if the former obtains possession of the property, as a good steward he must *keep an account* of the rents and profits, and *be always ready with it*, in liquidation of the mortgage debt, without profit or benefit to himself—liable for waste and negligence, and not allowed for anything but *taxes and necessary repairs*. And, so jealous is a court of equity to protect this right of redemption, that the mortgagee can do nothing to clog or embarrass it." Nay, this is not all. So highly is the equity esteemed, and so much regard have the courts in enforcing it to the protection of the debtor from the hardness of his creditor, that the express stipulation of the parties in the deed of mortgage, will not avail to cut it off. This is the rule, and equity hardly knows an exception to it. And the equity will be revived by the exquisite vigilance of the courts in its behalf by the slightest act or indication in its favor, though more than twenty-one years have elapsed. Nor is this to be set down to the esteem in which the law holds admissions made against the interest of him who makes them. 572] The law discovers *no such jealousy or solicitude in behalf of one who is cut out of his action for the recovery of lands by the operation of the limitation acts on adverse possession. The acknowledgement of title which there destroys the adverse character of the possession, is a far more substantial kind of admission than those which the cunning scrutiny of the chancellor has so often held sufficient to restore—for that is the true word to express it—the lost equity of redemption.

In plain truth, resisted at first by courts of law, and imposed upon the English system at last by a decided victory gained over common-law stubbornness, by the subtle chancellors, the equity of

redemption has become a *pet* of all the courts. Our own Kent allows himself to rise into a sort of extasy in celebrating this triumph of equity over strict law.

This disposition, so manifest in the judges, to indulge a fondness for the equity of redemption, has stimulated some legislative bodies to secure for the equity a liberal regard in the courts. Counsel have referred us to a statute of Rhode Island, authorizing the Supreme Court of that state to allow redemption of any mortgaged estate, after twenty years possession, if peculiar circumstances should render it equitable; and in *Dexter v. Arnold*, 3 Sumn. 152, the circuit court of the United States held "that it should be governed by that statute, though especially addressed to the state court; first, because it furnished the *appropriate analogy* upon the *known doctrine* of courts of equity; and, second, because it was a *mere affirmation* of the *general principles* on which courts of equity act in allowing or refusing a redemption." In Christian's edition of Blackstone, the annotator says: "In general, if the mortgagee has been twenty years in possession, the court of chancery, in conformity to the time of bringing an ejectment, will not permit the mortgagor to redeem, unless during part of the the time the mortgagor has been an infant, or a married woman; or, unless the mortgagee admits he holds the estate as a mortgage; or he has kept accounts upon it, and treated it as redeemable, within *twenty years; or *there is some other* [573] *special circumstance which forms an exception to the general rule.* Eq. Ca. Abr. 313; 2 Bro. 399; 2 Ves. Jun. 83; 3 P. Wms. 283; 2 Fonbl. Eq. 264, 267."

What then is this equity of redemption, considered not as the spoiled pet of the chancellor, but the sober offspring of justice, treated without fondness on the one hand, or prejudice on the other? Is it a right so absolute, so fixed within the limits of inflexible rules, that the time within which it can be claimed, and the conditions of its existence, are settled, certain, uniform, and unquestionable? Or, on the contrary, may the time of its duration be lessened, or enlarged—for if one may, the other can be—upon equitable considerations, belonging peculiarly to each case?

It seems to me a right, governed in its exercise, by a rule so easy and shifting, so open to equitable exceptions, that it can hardly be deemed a rule at all. Long after twenty years, equity may find some special circumstance on which to found a decree allowing redemption. I can not doubt, that long *before* the lapse of that period,

equity may find some special circumstance, on which to found a decree, *denying* redemption.

Such special circumstances, I think, exist in this case, as warrant a denial of the relief, even if the twenty-one years can, in equity, be deemed not past when this bill was filed. I have already glanced at these circumstances. They consist in claims as to improvements which are inconsistent with the idea of redemption, and suggestive of an intention wholly to abandon the lands and the equity in them forever; in the quality and condition of the lands; in the relation of sub-purchaser to the first buyer, and of many sub-purchasers to each other; in the character, objects, and motives of the purchasers; in the condition of the country generally, in which these lands lay, as to its degree of cultivation, and the habits of its settlers; and in other circumstances and behavior of the parties, among which I take the following to be not the least considerable: While the strict duty, not too strongly stated by complainant's counsel, rested on the mortgagees of constantly keeping an account, and being always 574] ready with it, *the mortgagor, or those claiming under him, behaved so as to show that no account was expected, and saw without a word of caution, claim, or objection, the making of improvements by the mortgagee, which enhanced the value of the estate, and might "cripple the right or power of redemption." See 2 Story's Eq. Jur., sec. 1016*b*.

But in my judgment, equity ought to date the adverse possession from about the time at which it became certain that the defendant, in the ejectment suit, meant to repose on the judgment in that case, and to claim the benefit of the occupying-claimant law. This was in 1822; but as the proceedings under the occupying-claimant law would take some time, it might be fair to extend the time to 1823. Longer, however, I would not extend it to find the date of the *substantial* possession of the mortgagees. All the delay between the time last mentioned, and the actual execution of the writ of possession, is, in equity, to be charged to Robinson.

Of the admissions contained in the chancery proceedings, I can make nothing available to these complainants. They were not parties; and the admissions were not made by those most largely interested in the defense of this case. Taking all the facts together, I consider the adverse possession as unbroken, so far as these plaintiffs are concerned.

If this conclusion seems to take too little notice of another ad-

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mission, made in 1827, by taking judgment, I can only say, that against the strong indications in the conduct of all the parties, that they all considered the possession of the original mortgagees as having acquired the character of that which distinguishes absolute ownership, I can feel little disposition to regard the technical or strict logical effect of the proceedings resorted to, to get in the title of these lands. Those proceedings were little better than a comedy of errors.

In the whole case, then, I see no equity for the complainants and no difficulty in denying the redemption prayed. It may be that I attach too much importance, and assign an extent too great, to the equitable control of the estate in question; but existing outside of any deed, the mere creature of equity, words, acts, or silence, may, in my judgment, defeat, as well as preserve it. I am apt, [575 too, to believe, that there is some true significance in most names. I can not well understand an equity which works injustice; and if I can land that which we can call an equity of redemption for anything, it is, that it was invented as a shield against oppression, and that according to the vital conditions of its existence, it can never be made the instrument of vexing the distressed, as, in some exceptional cases, may many of our strict legal rights.

DAVID HALL v. THE STATE OF OHIO.

Coin is embraced in the terms "goods and chattels," as used in the 26th section of the crimes act.

In error from Athens county.

The plaintiff in error was convicted upon an indictment for receiving certain gold coin which had been stolen.

The indictment was framed on the 26th section of the crimes act of 1831 (Swan's Stat. 273), which provides: "If any person shall receive or buy any *goods and chattels* of the value," etc., "that shall have been stolen," etc., "knowing the same to be stolen," etc., "with intent to defraud the owner," etc.

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It is claimed by the plaintiff in error, that the legislature did not intend to include money under the terms "goods and chattels."

R. E. Constable, for plaintiff in error.

McCook, attorney-general, for the state.

SWAN, J.† We have examined the cases referred to by counsel. An English statute, in substance the same as the section above referred to, has been construed as not having been intended to include the receivers of stolen money. The English court, in so deciding, concede at the same time, that money is in general embraced in the words goods and chattels.

576] *It is therefore here, as it was in England, a question whether the legislature intended to limit the meaning of the words goods and chattels.

The receivers of stolen bank bills, are subjected to punishment by the crimes act. The receivers of stolen coin are exempt from punishment, unless the section under consideration embraces them. We are called upon to say that such a discrimination was intended by the legislature, and to do so by giving a limited construction to words which do embrace receivers of stolen coin.

The same legislature that enacted the 26th section, have, by direct implication, in the same act included money in the terms goods and chattels. The 18th section provides: "That if any person shall steal any money or *other* goods or chattels," etc.

If, then, we look to the general scope of the law as to receivers of stolen property, and to the legislative intention in respect to the use of words, we are led to the conclusion that the section under consideration embraces money; and if we consult the common definition of words, it is clear that coin is included under the general terms, goods and chattels. There is nothing in the statute which demands, by construction, a limitation of its terms.

Judgment affirmed.

† The term of WARDEN, J., expired before the decision of this cause.

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By the constitution and the act of February 19, 1852, for the organization of the courts, ample power was given to this court to review a judgment of the late Supreme Court on the circuit.

But the writ of error in such case must have issued within one year after the judgment.

ERROR. The case is as follows :

Groves sued out a writ of error to a judgment of the late Supreme Court, more than a year after the rendition of the judgment.

**Follett*, for defendant, moved to quash the writ on the following grounds: [577]

1. That there is no statutory provision authorizing judgments of the late Supreme Court to be reviewed upon writ of error; 2. That the writ was issued more than one year after the rendition of the judgment.

William Stanberry, contra.

THURMAN, C. J. We are of opinion that by the constitution and the act of assembly of February 19, 1852, for the organization of the courts, ample power was given to this court to review a judgment of the late Supreme Court upon the circuit.

But a question arises whether the writ of error, for that purpose, could be issued after one year from the rendition of the judgment. The act allowing writs of error to the court in bank, required them to be sued out within that period. If that limitation applies to this court, the motion to dismiss the writ, in this case, must be sustained, as it was not issued within the prescribed time.

In *Shepler v. Dewey*, 1 Ohio St. 331, it was held that the power to issue a writ of error in a civil case, was referable rather to the provisions of the 18th, than to those of the 4th section of the act organizing the courts. So much of the 18th section as it is necessary to quote here, is as follows: "All process and remedies authorized by the laws of this state, when the present constitution took effect, may be had and resorted to, in the courts of the proper jurisdiction, under the present constitution."

The remedy, under the former constitution, in a case like this,

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was by writ of error sued out within a year. A majority of the court are of opinion that the legislature, by the act above cited, and the amendatory act of April 30, 1852, intended to give no larger remedy, and that therefore, the one year limitation does apply to this court. If this were not so, it would be questionable whether there is any limitation at all.

Let the writ be quashed.

578] *THE MILAN AND RICHLAND PLANK-ROAD COMPANY v. EDWARD E. HUSTED, TREASURER OF HURON COUNTY.†

That the legislature of Ohio has no constitutional authority, in conferring special privileges on a corporation, to abridge or relinquish to any extent or in any manner whatsoever, by contract or otherwise, any portion of the power of taxation over its corporate property, has been settled by solemn adjudication, and is not now an open question in this state. *Debolt v. The Ohio Life Insurance and Trust Company*, 1 Ohio St. 564.

The ninth section of the charter of this corporation, which expressly provides that, in consideration of the expenditures which the company will necessarily have to incur in making and keeping up its plank-road, the property of the corporation, of every kind, *shall be forever wholly exempt from taxation*, must be construed with reference to the constitutional powers of the legislature, and as operative only to exempt the company from taxation under the authority of any laws existing at the time the act of incorporation was passed, but as wholly inoperative as against any subsequent law imposing a tax upon the company.

THIS is a petition in error, to reverse the judgment of the common pleas of Huron county. The plaintiff in error having refused to pay the taxes assessed upon the property of the corporation for state and county purposes, for the year 1852, Edward E. Husted, as the treasurer of Huron county, instituted proceedings in the court of common pleas, by scire facias, pursuant to statute, in order to enforce the collection of the taxes so assessed. To this proceeding, the plaintiff in error plead specially, that by virtue of the act of the general assembly of the State of Ohio, incorporating the company, it was expressly provided and agreed, that in consideration of the construction of its plank-road by the company, no assessment or tax should ever be levied and collected against said company; and

† This case should have appeared in the second division of the volume, the judges participating being CORWIN, THURMAN, RANNEY, CALDWELL, and BARTLEY.

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that the company having organized and constructed its plank-road under this law, it was exempt from the assessment of the tax sought to be enforced, etc. To this plea a demurrer was interposed. The court of common pleas sustained the demurrer, and rendered judgment against the corporation for the amount *of the taxes, [579 together with the interest and penalty thereon, which judgment the plaintiff in error now seeks to reverse.

It appears that the Milan and Richland Plank-road Company was duly incorporated by a statute passed by the legislature of this state, February 19, 1845. 43 Ohio L. 111. The act of incorporation confers the usual privileges exercised by corporations of this description, authorizing the company to enter upon; and take, and use the necessary land, materials, etc., for the purposes of its road, and to erect toll-gates on the road, when completed, and exact the payment of such an amount of toll, by persons using the road, as the directors may, in their discretion, prescribe. And the ninth section of the act of incorporation is in the words following, to wit: "That in consideration of the expenses which said company will necessarily incur in constructing said road, with the appurtenances thereof, and in keeping the same in repair, the said road and its appurtenances, together with all tolls and profits arising therefrom, are hereby vested in said corporation, and the same shall be forever exempt from any tax, imposition, or assessment whatever."

The law under which the taxes in question were assessed on the property of the plaintiff in error was enacted May 2, 1852, and requires the property of all persons, including corporations, in this state, to be taxed equally, and at its actual value in money.

J. R. Osburn and E. B. Sadler, attorneys for the plaintiff.

A. S. Curtis, attorney for the defendant.

BARTLEY, J. The plaintiff in error claims an absolute and perpetual exemption from taxation, upon the alleged ground that the law incorporating the company is a contract between the state and the corporation, containing a stipulation, in express terms, that the corporation should be forever exempt from taxation. This was the defense relied upon as a bar to the action in the court below; and upon *the ground that it was overruled by the court, the [580 plaintiff in error seeks to reverse the judgment. The question presented by the case is twofold in its character, involving the ques-

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tion whether the act incorporating the company is exempt from the legislative power of *amendment*, as well as the legislative *control over the right of taxation*. Inasmuch as the charter provides, in express terms, for a perpetual exemption from taxation, the corporation can be made liable to taxation only by legislation having the effect to amend the law creating it, by repealing the exemption.

The legislative or law-making power is the vital function which animates, directs, and controls the whole operation of civil authority. When it is conferred by the constitution *in general terms*, it extends to every legitimate purpose of legislation pertaining to civil government, subject to such limitations only as are expressly provided in the constitution. The power of taxation is included in the legislative power, and can be exercised only through its instrumentality, and by the authority of law. It is a means employed by the legislative power, which is as important to the continued existence of civil government as the circulation of the blood is to the human system. This attribute of sovereignty can not, under the constitution of this state, in any manner or to any extent whatever, be limited, abridged, or relinquished by *contract*, or *sale* to any person or association of persons.

The plaintiff in error derived the usual powers of a corporation from this law of its creation, including the important authority to take lands, materials, etc., the subjects of private property, belonging to other persons, and appropriate the same to the purposes of its plank-road; and also the very liberal authority to charge any rate of toll for the use of its road which the directors might, in their discretion, prescribe. If, upon these terms and in the exercise of these powers, the corporation had not sufficient inducement to construct its road, it was not competent for the legislature, by way of contract, and in consideration that the company would exercise the powers given it, and construct its road, to surrender the constitutional *power of taxation over it. The constitution of the state does not clothe the general assembly with the authority to surrender or part with any portion whatever of the taxing power, by contract or sale. That the legislature of this state has not the constitutional authority, in conferring special privileges on corporations, to abridge, or in any manner whatever surrender any portion of the right of taxation, has been settled by solemn adjudication, and is not now an open question in this state. *Debolt v.*

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'The Ohio Life Insurance & Trust Company, 1 Ohio St. 564; Toledo Bank v. The City of Toledo, Ib. 623.

This is decisive of this case; and upon this ground the judgment of the court of common pleas must be affirmed. In expressing the views of a majority of the court, however, I may go further.

By the first section of the second article of the constitution, the *legislative power* of the state is, in *general terms*, vested in the general assembly. This most important of all the powers of government, being *that* in which *the supremacy* of the government itself consists, must remain in full force, and undiminished. And the power of enacting laws necessarily comprehending *full power to amend and repeal laws*, if complete control over all existing laws did not exist, the legislative power would be imperfect, and incompetent to the complete performance of its high functions. The legislature can not, at one session, by the enactment of a law, in any manner, or to any extent whatsoever, limit or abridge the legislative power vested in this body, at any subsequent session. There is no provision of the constitution which enables the general assembly, in the enactment of a law, to provide, by *contract* or *otherwise*, against its amendment or repeal. If this could be done, the sovereign power of legislation itself, could be abridged by contract; for the legislative power must be as ample and complete in its capacity to alter and repeal existing laws, as it is in the power of the enactment of new laws. If a law could, therefore, in its nature, be a contract, it would be subject to the unavoidable *incidental [582 condition of amendment and repeal by the legislative power of the state. But a law and a contract are two things essentially distinct in their nature. A law is a rule of action prescribed by the supreme power in a state, which all persons within the sphere of its operation are compelled to obey. 1 Blackstone's Com. 40. A law is an enactment proceeding from the supreme power in the government, in consideration of the public interests. The enactment of a law can not be procured by contract. There is no provision in the constitution of Ohio, authorizing any person, or set of persons, to purchase the enactment of a law by contract. The exercise of the legislative power can not be made the subject of barter or sale. This highest function of civil authority acts solely and alone from the overruling considerations of the public interests. If the enactment of laws could be procured by *contract* or *purchase*, the public interests would be sacrificed to the corrupting considerations

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of special and private interests. A *law*, therefore, from its inherent nature, can not be a *contract*; on the contrary, it is a *rule of action* prescribed by the supreme civil power, solely and alone, from the paramount and controlling consideration of the public interests. A contract is essentially different and distinct. It is an agreement between two competent parties, upon a mutual and legal consideration, and in relation to a matter which is the legitimate subject of bargain or sale.

Although the law can not in its nature constitute a contract, yet it may authorize the making of a contract. Contracts to which the state is a party, are usually made under the authority of some existing law, and in conformity to its directions. But there is a plain and wide distinction between the law itself, and the contract entered into under its authority. Where a contract is entered into, pursuant to the authority of a law for the transfer of property, or the performance of services, a vested right may be created, separate and distinct from the law itself, so that, even if the law be sub-583] sequently amended or repealed, the obligations of *the contract and vested rights created, remain unimpaired. The repeal or amendment would be *prospective*, and not *retroactive* in its operation, and, therefore, not operative against the authority by which the contract was made. This distinction between a law and contract made under its authority, is one which has long been sanctioned by the Supreme Court of the United States, and recently recognized by the Supreme Court of Ohio. *Fletcher v. Peck*, 9 Cranch, 87; *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 530; 1 Ohio St. 640; *The Bank of Toledo v. Bond et al.*

The doctrine, however, that the charter of a private corporation is a contract, rests upon the ground that *the law* itself, under which the company organizes and acts as a corporation, is a contract and thereby exempted from the legislative power of amendment and repeal; and *this*, by *implication*, and without express provision to that effect! This absurd doctrine has been promulgated as law in this country for a number of years, to sustain certain views of public policy; but the whole doctrine is founded on the authority of the decision of the Supreme Court of the United States, in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, which, upon close examination, does not sustain it. The gross absurdity of this doctrine, and the authority which gave rise to it, is fully examined and exposed in the opinion of this court, in the cases of

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The Toledo Bank v. The City of Toledo, 1 Ohio St. 640; Knoup v. The Piqua Bank, Ibid. 604, and Mechanics & Traders' Bank v. Debolt, Ibid. 592.

In the case of the West River Bridge Company v. Dix et al., 6 How. 530, the Supreme Court of the United States held, that *the right of eminent domain*, one of the sovereign attributes of government, and essential to its preservation and the proper performance of its functions, in paramount to the rights of private property; and that, not only the *property*, but the *franchise* of a corporation, was held subject to its exercise. The right of *eminent domain* is certainly not any more important and essential to the existence of government, and *the proper exercise of its [584] powers, than the right of taxation, and the right of legislative control over existing laws by amendment and repeal. Those high functions of sovereignty are inherent in every distinct political community, which are essential to guard its own existence, and to protect and promote the public interests. The exercise of these highest acts of sovereignty, relate not only to the external relations of government, but extend to the interior polity and relations of social life, and must be regulated with reference to the public interests and advantage of the whole community. And all private rights must be held as subordinate, subject to the control of these indispensable functions of civil authority. This does not affect the inviolability of private property. The obligations of contracts, and indeed all rights of private property, rest upon those incidental or implied conditions, which are superinduced by the pre-existing and higher authority of the laws of nature, of nations, and of the community in which they exist. The right of taxation, and the right of legislative control over existing laws by amendment and repeal, as well as the right of eminent domain, are high trusts of delegated sovereign authority, which the mere agents authorized to administer them have no power to abridge or surrender to any extent, or in any manner whatsoever. That the legislative power may sometimes select its objects for taxation, and within its constitutional powers, provide a total or partial exemption from taxation for property of a particular kind, or the property of particular persons, does not affect the question, provided such laws remain subject to *amendment* and *repeal*. The taxing power is not abridged or surrendered, so long as it is subject to legislative control. But if the legislature can pass a law, and provide by contract against

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its amendment or repeal at any subsequent session, it can surrender or relinquish a portion of the legislative power. And if the legislature can, by the enactment of a law, provide perpetual and irrevocable exemptions from taxation, it can virtually relinquish the [585] taxing power for the benefit of those in whose favor the exemptions are provided. If the taxing power can be thus irrevocably relinquished for the benefit of corporations, it can be done for the benefit of natural persons; and if it can be done for the few, it can be done for the many. If the legislature can enact laws for the benefit of corporations, and by contract surrender the legislative control over them, it can do the same thing for the benefit of natural persons. And if this can be done for a few favored persons, it can be done for the many. Thus the sovereign power of legislation, and of taxation, could be relinquished and impaired, so as to destroy their efficiency to sustain the government, without the power of subsequent legislation to remove the difficulty by amending or repealing the laws. It was never intended by the constitution that these high trusts of civil power should be thus crippled and stripped of their efficiency and usefulness. It never was intended that the legislature should be clothed with the authority to surrender the powers, or any portion of the powers, which are essential to the preservation of the government itself. One of the great objects of written constitution is to provide against legislative discretion, which might lead to abuses, and ultimately to the destruction of the government itself. The legislative power of the state, therefore, which is, by the constitution, vested in the general assembly, must continue in full force and virtue at each succeeding session of that body, and remain wholly unimpaired by contract, or other provision, for its surrender or limitation, made at any preceding session of that body.

The ninth section of the charter of this corporation, therefore, providing for the exemption from taxation, was operative to protect the company from taxation under the authority of any statute existing at the time the act of incorporation was enacted, and until the legislature should otherwise provide. And although this exemption in its terms would seem to be perpetual, it is to be construed with reference to the constitutional powers of the body which enacted it, and, therefore, as *perpetual only* as against the [586] laws existing at the time of its passage; but as wholly inoperative as against any subsequent laws which might be enacted

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imposing a tax upon this corporation. This is the construction, which, in the exercise of the judicial power of the state, a majority of the court places upon this state law.

The judgment of the court of common pleas affirmed.

Judges RANNEY and THURMAN confined their expression of opinion to the propositions stated in the syllabus, not deeming it necessary to pronounce upon the other matters considered in the opinion of Judge BARTLEY.

THE NORWALK PLANK-ROAD COMPANY v. EDWARD E. HUSTED,
TREASURER OF HURON COUNTY.

BARTLEY, J. This case is, in all its features, similar to the preceding case of The Milan and Richland Plank-road Company, and dependent on the same questions. The judgment of the court of common pleas is, therefore, also affirmed, in this case, on the grounds stated in the other case.

INDEX.

ABATEMENT. See **LIQUORS.**

ACKNOWLEDGMENT. See **DEBT.**

ACTION—

1. The liability to make reparation for an injury, by negligence, is founded upon an original moral duty enjoined upon every person, so to conduct himself, or exercise his own rights, so as not to injure another. *Kerwhacker v. C. C. & C. R. R. Co.* 172.
2. The mere fact that one person is in the wrong, does not necessarily discharge another from the due observance of proper care toward him, or the duty of so exercising his own rights, as not to do him any unnecessary injury. *Ib.*
3. The doctrine that, in case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject to several qualifications. See **NEGLIGENCE**, 1, 2, 3. *Ib.* See **RAILROAD COMPANIES**, 2, 3, 4, 5.
4. Corporations are liable for injuries arising from the negligence or carelessness of their employes, in the course of their employment, as private individuals are. *C. C. & C. R. R. Co. v. Keary*, 201.
5. Contracts *contra bonos mores*, forbidden by positive law, or opposed to public policy, can neither be ratified nor enforced; but where the only illegality of an act arises from statutory prohibition of it under penalty, the whole statute must be examined to ascertain whether the legislature intended that contracts made in violation of it should be avoided. *State v. Ex'r of Butties*, 309.
6. In our statutes prohibiting the agents of the state from lending its money, there is no intention to relax the maxim *ex turpi causa non oritur actio*; but this rule does not annul contracts made by an agent in the name of his principal without authority, or in disobedience of the principal's orders. The whole object, spirit, and design of the statutes in question are preserved, when they are made operative between the state and its agents, in deterring the latter from the interdicted use of the public moneys. The option belongs to the state whether she will or will not make herself a party to the unauthorized acts of her agents. *Ib.*
7. The general assembly alone can declare this option. *Ib.*
8. But the ratification may be without a public law for the purpose, and by proceedings, of which this court can not take judicial notice. *Ib.*
8. If lands, incumbered by a tax lien, are sold upon execution, and the taxes are afterward collected from the judgment debtor, by distraint of his personal property, or other proceeding under the tax law, he is without recourse upon the purchaser of the land, notwithstanding the incumbrance is thereby removed. On the other hand, if the taxes are made by a sale of the lands, the owner has no action against the judgment debtor, although the debt of the latter is thus paid. There is no relation of principal and surety between the parties. *Creps v. Baird*, 277.
10. If, upon the motion of a purchaser upon execution, surplus money remaining after the satisfaction of the writ, and to which the judgment debtor is entitled, is by order of the court, and without the consent of the debtor,

 Amercement.

Action—Continued.

- applied to discharge taxes due upon the land when sold, such debtor may, after a reversal of the order, recover the sum thus applied, from said purchaser, in an action of assumpsit for money paid to his use. *Ib.*
11. An action does not lie, under the water-craft law, against a vessel, to recover money loaned. *Dewitt v. Schooner St. Lawrence*, 325.
 12. Nor for a breach of an executory contract for the transportation of goods, where the goods are not delivered to the vessel, and where, therefore, the obligation of a common carrier never arose. *Ib.*
 13. An action will lie on a covenant, made on the dissolution of partnership between T. and M., binding M., for a limited period, not to engage, in the city of C., in the former business of the firm. Otherwise, as to the covenant which attempts to prevent M. from interfering or competing with any branches that T. might establish at any and all other places. *Thomas v. Miles*, 274.
 14. Under the act for the prevention of gaming, passed in 1831, the loser of a bet may maintain an action founded on the act, though it be commenced more than six months after the payment of the bet. The act gives the loser the exclusive right of action the first six months; after that it gives it to any one, whether the loser or another, who first sues. *Hoss v. Layton*, 352.
 15. The provision in the act of March 8, 1831 (Swan's old ed. 652), that a recognizance minuted on the journal, "shall be considered as of record in such court, and proceeded on by process issuing out of said court, in the same manner as if such recognizance had been entered into before said court," did not require that an action of debt on such recognizance should be commenced by process issuing out of said court. *State v. West*, 509.

SEE CONTRACT; BANKRUPTCY; RESPONDEAT SUPERIOR; TREASURER; EXECUTION, 6; LIMITATIONS OF ACTIONS.

AMERCEMENT—

1. He who would avail himself of the remedy of amercement, must bring himself both within the letter and spirit of the law. *Webb v. Anspach, Brother & Co.* 522.
2. The statute relating to amercements, being part of "an act regulating judgments and executions," passed March 1, 1831 (Swan, old ed. 484, sec. 32), expressly required the motion to amerce to be made in open court. Filing a paper in the clerk's office in vacation was not such motion. *Ib.*
3. Any but the slightest variance between the notice of the motion and the motion itself, will be fatal. *Ib.*
4. When a sheriff receives money, paid to discharge a levy on personal property after the return or return day of the writ, it may be a question whether his act was legal; but in strictness, such money is certainly not made *upon* the writ. *Ib.*
5. Under the statute governing this case, it may be that for a refusal to pay money thus made, there might be an amercement. But if so, it would be by virtue of the general language of the thirty-second section, to wit: "all moneys by him collected or received for the use of said party." *Ib.*
6. Where the goods levied on were sold under an agreement of the parties, and in a mode wholly unknown to the due execution of a fieri facias, the parties can not hold the sheriff *officially* responsible, and thereby charge his sureties, as well as himself, with his defaults. For his sureties may be made parties to a judgment of amercement, and upon a scire facias for that purpose, they are not permitted to set up as a defense any matter that occurred previous to the entering of the judgment. And this is an additional reason to those stated by Hitchcock, J., in *Duncan v. Drakely*, 10 Ohio, 47, why proceedings to amerce an officer are *strictissimi juris*. It is enough for sureties to be liable when the due execution of process is not interfered with by the party who complains. *Ib.*

Ancestor—Banks, Bankers, and Brokers.

ANCESTOR—

1. The "ancestor" meant by "an act regulating descents and the distribution of personal estates" (Swan, old ed., note *a*, 286), was any one from whom the estate was inheritable. Lessee of Prickett v. Parker, 394.
2. The "ancestor from whom the estate came," was he from whom it was immediately inherited. *Ib.*
3. E. P. purchased certain lands, and died intestate, leaving I. P. and J. P., his sons and heirs; and R., his widow, married again. Before the birth or conception of issue of the second marriage, I. P. died, intestate and without issue, being an infant. J. P. afterward died, intestate and without issue. At the time of *his* death, there was issue of the second marriage. *Held*, that, within the meaning of the said act, I. P. was the ancestor of J. P., from whom a moiety of the lands came to the latter; and that on the death of J. P. his half-brothers took that moiety, under the last part of the fourth clause in section first of the act cited. *Ib.*

ANIMALS. See CATTLE; RAILROAD COMPANY, 2, 3, 4, 5; NEGLIGENCE.

APPEAL—

1. The statute regulating appeals to the district court, passed March 23, 1852, authorized an appeal on petition. Mack v. Bonner, 366.
2. A recognizance taken under the act of March 14, 1831, defining the duties of justices of the peace in civil cases, is sufficient, if taken in the form prescribed in the 111th section of that act; although neither the recognizance nor the transcript shows which took the appeal. Holton v. Wade and wife, 543.

ATTORNEY—

1. Under the ordinary employment to collect a claim by suit, an attorney can not release or postpone the lien on lands resulting from the prosecution of the claim to judgment. Wilson, Vogle & Seigers v. Jennings, 528.
2. An honest belief that the release or postponement will be for the client's benefit can not supply the defect of authority to make such arrangement. The authority for that purpose must be express or implied beyond the mere retainer to sue and collect the claim. *Ib.*
3. Where, by the agreement of the attorney, without such particular authority, a prior was postponed to a junior lien, the holder of the junior lien could not, without constructive fraud, employ the same attorney to consummate the preference improperly given to his lien, by instituting a proceeding in chancery, in which the attorney appeared and answered for the holders of the postponed lien (who had no actual notice of the proceeding), and, admitting the priority of what was really the junior lien, procured a decree accordingly. *Ib.*
4. Nor, in the absence of a particular express or implied authority for that purpose, could the attorney for the prior judgment creditors, bind his clients by an agreement with A, that A should bid off the land under the execution, and that without any payment of money, the sale should be returned and confirmed, and a deed executed to A, who should afterward sell the lands for the best price that could be had, and apply the proceeds so as to postpone the lien of the judgment creditors to a junior lien as aforesaid. *Ib.*
5. The resort by the judgment creditors in such a case to an action at law in which they sought to recover the unpaid bid of A, to the extent allowed in the decree before mentioned, which stood in the way of a full recovery in that action, was no bar to a subsequent bill to impeach the said decree for fraud, and to obtain the complete satisfaction of the lien which had been improperly postponed. *Ib.*

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 17; WARRANT OF ATTORNEY.

BAIL. See RECOGNIZANCE; PRACTICE IN CRIMINAL CASES, 1 to 7.

BANKS, BANKERS, AND BROKERS—

1. The tax law of April 13, 1852, is valid and constitutional in the basis it

 Bankruptcy—Bills of Exchange and Promissory Notes.

BANKS, BANKERS, AND BROKERS—Continued.

provides for the taxation of banks, bankers, and brokers. *Exchange Bank v. Hines*, 1.

See **TAXATION**.

2. Persons having money employed in the business described in the 15th section of the act in question, are bankers, such as are forbidden to make deductions by the constitution, article 12, section 3. *Ellis & Morton v. Linck*, 66.
3. Moneys deposited with a bank or banker (unless *specially* deposited), become the moneys of the bank or banker, appertaining to the business of banking, and proper to be listed with other moneys belonging to that business; and this is equally true of general deposits, whether they happen to be used in the discounting of paper, or held in reserve to pay probable current demands. *Ib.*

BANKRUPTCY—

1. Upon a decree of bankruptcy, all the property of the bankrupt, of every kind and description, passes to and is vested in the assignee. *Pugh's Adm'x v. Holliday*, 284.
2. In an action on a promissory note or bill of exchange, made payable to several payees, one of them having become bankrupt, the assignee in bankruptcy must be a party plaintiff with the other payees, and not the bankrupt himself. *Ib.*
3. If the bankrupt, before decree, has assigned a chose in the action so as to pass all the beneficial interest to his assignee, suit may be brought in the name of the bankrupt, for the use of the assignee. *Ib.*
4. When one of the payees has become bankrupt after having transferred his interest in a note to the other payees, suit may be brought in the name of all the payees, for the use of those who were not bankrupt. *Ib.*
5. When the payees do so unite, and on the trial of the case, after proof by defendant of such bankruptcy, the plaintiffs introduce a paper purporting to be an assignment by the bankrupt to the other payees, bearing date before bankruptcy, the mere fact that the paper bears date before, is not evidence that it was executed on that day, without any other evidence of the time of execution. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES—

1. A gave his name in blank to B as an accommodation to enable B to raise money; B then wrote a promissory note on the other side of the paper, payable to C or order, signed it as maker, and procured the indorsement of C upon the back under that of A; and subsequently procured the indorsement of D, and in this condition got it discounted. *Held*: That the holder was authorized to treat A as an indorser, and not as an original promisor, upon whom demand was necessary to charge the other indorsers. *Greenough v. Smead*, 415.
2. Such a construction should be put upon the contract as will prevent its failure, and give effect to the obligation of each of the parties appearing on it at the time the contract itself takes effect. *Ib.*
3. Whenever the obligation of a party appearing upon the back of a negotiable paper can, at that time, take effect as an indorsement, it should be held to do so as conforming more nearly to the general intention of parties assuming that position upon it. *Ib.*
4. In the application of these principles, when the name of a stranger is put upon the back of a note intended for a payee, and to give it credit with him, as such person can not be charged as an indorser, effect should be given to his undertaking by holding him liable as a surety or guarantor. *Ib.*
5. But where the paper is not designed for the payee, and his indorsement is also obtained to give the paper credit with a subsequent party, the party indorsing at the time or before the paper is drawn, may and should be treated as a second indorser. *Ib.*

 Bills of Exchange and Promissory Notes.

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

6. It is not error to refuse to order the plaintiff, in an action against an indorser, to fill up the indorsement before judgment. *Ib.*
7. Usury, in this state, will not vitiate the entire contract on the part of a surety on a promissory note, but only render the note voidable to the extent of the illegal consideration. *Selser v. Brock*, 302.
8. Where a joint and several promissory note in blank is signed by several persons as sureties, and delivered to the principal debtor, to be by him filled up and given to the payee, if an illegal rate of interest be agreed upon between the principal debtor and the creditor, and incorporated in the amount for which the note is made payable, the contract is voidable to the extent of the usury only, and creates a binding obligation on the part of the surety for the principal and legal interest, whether the usury be inserted with the knowledge and consent of the surety or not. *Ib.*
9. If, with the *knowledge or assent* of the creditor, any material part of the transaction between the creditor and the principal debtor be misrepresented to the surety, the misrepresentation being such, that, for the same having taken place, the suretyship would not have been entered into, the security so given is voidable at law, on the ground of fraud. *Ib.*
10. But where a fraud is practiced by a principal debtor in procuring a surety to sign a note without the knowledge of the creditor, the obligation of the surety is valid and binding. *Ib.*
11. A surety, in signing his name to a promissory note below or after the names of other persons have been placed on the note as co-sureties, although he does not thereby warrant, does in effect affirm the genuineness of the previous signatures, and can not avoid his liability to the payee, by showing that they had been forged to the note by the principal, but of which the creditor had no notice. *Ib.*
12. Where one of two innocent persons must suffer by the fraud of a third person, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong, must bear the loss. *Ib.*
13. The doctrine that a material alteration in a deed, or contract in writing, beneficial to the holder, or party making the alteration, will vitiate the instrument, is founded on a presumption of fraud; and the alteration, to have such effect, must be such as to effect some change in the meaning or legal operation of the instrument. *Huntington & McIntyre v. Finch & Co.* 445.
14. Where such alteration appearing in an instrument is not peculiarly suspicious, and beneficial to the person seeking to enforce it, the alteration will be presumed to have been made either before the execution of the paper or by the agreement of the parties afterward. *Ib.*
15. The erasure of the name of a surety on a promissory note, or bill of exchange, by agreement between the surety and the payee, is not such an alteration as will invalidate the instrument as against the principal. *Ib.*
16. A warrant of attorney to confess a judgment executed by the principal and surety on a note or bill, although in its terms authorizing a joint judgment against principal and surety, may be a good power to take a judgment against the principal alone. *Ib.*
17. A *bona fide* holder of negotiable paper, received by indorsement, or other proper mode of transfer, before due, for a valuable consideration, is protected against the defense which the maker might have against the original payee, yet, in this case, as in every other, it is the duty of every person to use ordinary care and prudence in his transactions, to prevent their operating to the prejudice of others. *McKesson v. Stanbery*, 156.
18. Whatever may be the rule where no fraud is shown to have been perpetrated on the maker by the original holder, in transferring the note, in a case which shows that the transfer on the part of the first holder was a positive fraud, it lies on the party claiming under such transaction, to show that he acted honestly, without knowledge of the fraud. *Ib.*

Cases in Ohio Reports Affirmed, etc.—Conflict of Laws.

BILLS OF EXCHANGE AND PROMISSORY NOTES—Continued.

19. A mortgage lien to indemnify mortgagees against loss by reason of their having accepted drafts for the accommodation of the mortgagors, is not necessarily lost by a change of the evidences of liability, as where the first acceptances are taken up with the proceeds of like acceptances made for that purpose. *Choteau v. Thompson & Campbell*, 424.

CASES IN OHIO REPORTS AFFIRMED, ETC.—

1. *McFarland v. Febiger's Heirs*, 7 Ohio, 194. *Carter v. Goodin*, 75.
2. *Stevens v. Little Miami R. R. Co.*, 20 Ohio, 415, affirmed. *C. C. & C. R. R. Co. v. Keary*, 202.
3. *Stoughton & Hudson v. State*, 2 Ohio St. followed. *Mackey v. State*, 362.
4. *Moore v. Vance*, 1 Ohio, 1, and *Kinsman v. Loomis*, 11 Ohio, 447, followed, by *Crumbaugh v. Kugler*, 2 Ohio St. 373, approved as to acknowledgment of deed. *Lessee of Mitchell v. Ryan*, 377.
5. *Tracey v. Sackett*, 1 Ohio St. 54, approved. *Gazley v. Huber*, 399.
6. *Huber v. Gazley*, 18 Ohio, 18, affirmed. *Ib.*
7. *Birney's case*, 8 Ohio, 237, approved. *Miller & Gibson v. State*, 475.
8. *Debolt v. Ohio L. Ins. and Tr. Co.*, 1 Ohio St. 564, approved. *Milan & R. Plank-road Co. v. Husted*, 578.
9. *Lange v. Werk*, 2 Ohio St. 519, approved. *Thomas v. Miles*, 274.
10. *Harris v. Clark*, 10 Ohio, 5, limited. *Greenough v. Smead*, 423.
11. *Robb v. Irwin's Lessee*, 15 Ohio, 689, approved. *Sheldon v. Newton*, 505.

CATTLE—

1. No law in Ohio prohibiting the owner of domestic animals from suffering them to run at large, except when they are unruly or dangerous, the owner of animals not unruly or dangerous, in allowing them to be at large on the range of uninclosed lands, is not chargeable with an *unlawful act*, or an omission of *ordinary care* in keeping his stock, subject to the qualification, however, that animals which are unruly or dangerous, are required to be restrained. *Kerwhacker v. C. C. & C. R. R. Co.* 172.
2. No law in this state requires any person to fence or inclose his own lands; yet the person who leaves his grounds uninclosed, takes the risk of occasional intrusions thereon, by the animals of others running at large; and the owner of such animals allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident, from any danger into which they may happen to wander. *Ib.*

See RAILROAD COMPANIES, 2, 3, 4, 5; NEGLIGENCE, 1, 2, 3.

CAVEAT EMPTOR—

The rule of caveat emptor applies to purchasers at judicial sales. *Creps v. Baird*, 277.

CHATTEL MORTGAGE. See EXECUTION, 3.

COIN. See RECEIVING STOLEN GOODS.

COMMON LAW. See STARE DECISIS.

COMMON PLEAS. See COURTS.

CONFESSED JUDGMENT. See PRACTICE, CIVIL, AT LAW, 1, 2, 6.

CONFLICT OF LAWS—

1. The cases to which the Ohio water-craft law extends, are not of exclusive admiralty and maritime cognizance, but those over which the courts of admiralty, and the common-law courts of the state, have concurrent jurisdiction. *Keating v. Spink*, 105.
2. In such cases, the court first acquiring jurisdiction by seizure of the thing in controversy, withdraws it from the jurisdiction of the other; and it can not be taken from the custody of the law, by process issuing from any other court. *Ib.*
3. Process issued upon proceedings instituted in admiralty for the recovery of seaman's wages, is no exception to this rule; especially when the court having the vessel in custody, is competent to recognize and enforce his paramount lien. *Ib.*

Constitutional Law.

CONFLICT OF LAWS—*Continued.*

4. The sheriff or other officer having the vessel in custody, under the state law, is under no obligation, and has no right to surrender it to the marshal upon such process; and if he does so, is liable to the creditor in the state court. *Ib.*

CONSTITUTIONAL LAW—

1. The provision of the constitution (art. 2, sec. 16), that "every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending, shall dispense with this rule," does not require that every amendment to a bill shall be read three times. *Miller & Gibson v. The State*, 475.
2. Every reasonable intendment is to be made in favor of the proceedings of the legislature. It is not to be presumed that the assembly, or either house of it, has violated the constitution. When, therefore, it appears by the journals, that a bill was amended by striking out all after the enacting clause, and inserting a "new bill," so called, it can not be presumed that the matter inserted was upon a different subject from that stricken out; especially when the matter inserted is consistent with the title borne by the bill before such amendment. This is the more obvious since the constitution provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." (Art. 2, sec. 16.) Nor does the fact that the inserted matter is called a "new bill," prove that it was not an amendment. *Ib.*
3. No bill can become a law without receiving the number of votes required by the constitution, and if it were found, by an inspection of the legislative journals, that what purports to be a law upon the statute-book was not passed by the requisite number of votes, it might possibly be the duty of the courts to treat it as a nullity. But it does not follow that an act that was passed by a constitutional majority is invalid, because, in its consideration, the assembly did not strictly observe the mode of procedure prescribed by the constitution. There are provisions in that instrument that are directory in their character, the observance of which by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. *Ib.*
4. For aught that appears in the journals of the senate and house of representatives of the general assembly, the act of May 1, 1854, entitled "an act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," was constitutionally enacted. *Ib.*
5. Neither section 1, 2, 3, 4, nor 8 of the act, properly construed, is repugnant to the constitution. In saying this, we do not mean to affirm that the legislature has the power to wholly prohibit traffic in intoxicating liquors in this state. Without deciding whether the assembly has any power over this subject by virtue of the general grant of legislative power in section 1 of article 2 of the constitution, we hold that the enactment of said sections of the law is authorized by the express grant of power in section 18 of article 16, in these words: "No license to traffic in intoxicating liquors shall hereafter be granted in this state, but the general assembly may, by law, provide against evils resulting therefrom." *Ib.*
6. The tax law of April 13, 1852, is valid and constitutional in the basis it provides for the taxation of banks, bankers, and brokers. *Exchange Bank v. Hines*, 1.
7. Section 10 of that law, which allows individuals and certain corporations, in giving their tax lists, to deduct their liabilities from the amount of their moneys and credits, is repugnant to the constitution of Ohio, and is void. The constitution permits no deduction of liabilities from moneys and credits. *Ib.*
8. But that section may be treated as void, without affecting the validity of the remainder of the act. *Ib.*
9. A corporate franchise, being a mere privilege, or grant of authority by

Constitutional Law.

CONSTITUTIONAL LAW—*Continued.*

- the government, is not property of any description, and consequently not subject to taxation under section 3 of article 12 of the constitution. *Bartley, C. J. Exchange Bank v. Hines, 7.*
10. The water-craft law of February 26, 1840, is constitutional. *Keating v. Spink, 105.*
See CONFLICT OF LAWS.
 11. The constitution confers no jurisdiction whatever upon the court of common pleas, in either civil or criminal cases. *Stevens v. The State, 453.*
 12. Parts of an enactment, when capable of separation, may be valid and effectual, while other parts may be void, by reason of their repugnancy to a constitutional provision. *Ib.*
 13. The constitutionality of the act of 1845, "to authorize William Lewis, trustee of the Mechanics and Traders' Bank of Cincinnati, to commence and prosecute suits against the debtors of said bank" (43 Ohio L. L. 308), so far as that act authorizes suits against parties to notes, etc., given to said bank, and against delinquent stockholders, as well as in the prohibition it contains against the defendants setting up the nullity of such evidence of indebtedness, is no longer an open question. *Bates v. Lewis, 459.*
 14. The statute for the relief of occupying claimants, passed March 10, 1831, requiring the value of the permanent improvements of the *bona fide* occupant, under color of title, to be paid as a condition precedent to the entry and possession of the owner, although an encroachment on the rights of private property as settled by the common law, rests upon a strong equity in favor of a compensation for improvements, which have augmented the value of land, and inured to the benefit of the owner. *McCoy v. Grandy, 463.*
 15. The option which the law gives to the owner of land, after a recovery in ejectment, either to take the land on paying for the improvements, or to take the amount of its value in money without the improvements, secures to the owner the property in the land, and at the same time protects the occupying claimant in his equitable claim to a compensation for his improvements. *Ib.*
 16. But the amendatory act of 1849, giving to the *occupying claimant* the option which the original act gave to the *owner* of the land, thus taking the property away from the owner after the solemn form of a recovery and judgment in ejectment, and transferring it to his unsuccessful adversary, who is ordered to be ejected as an intruder on the land, is a palpable invasion of the right of private property. *Ib.*
 17. In case of a mortgage, a judgment lien, a levy under an execution, assessment of a tax, or other incumbrance on land arising out of the owner's liabilities, it is not within the scope of the legislative power to take the fee in the land from the owner, and transfer it absolutely to the person holding the claim, while the owner stands ready and insists on discharging the liability and saving his property. *Ib.*
 18. The competency of the legislative power to transfer the property of one person to another, without the *consent* of the former, is not shown by any analogy, either to proceedings in partition, or the bar of the statute of limitation. In the case of the former, although the right of partition is an incident to the estate of tenancy in common, and the division the result of necessity, yet the owner is not divested of his property, without the opportunity of saving it by a purchase; and in the case of the latter, the bar of the statute rests upon a rule of evidence raising a presumption that the title has passed, and upon this ground the aid of the judicial power is denied to one who has slept too long on his rights. *Ib.*
 19. The occupying-claimant law rests upon entirely different ground; and in securing to the occupant a compensation for his improvements, as a condition precedent to the restitution of the property to the owner, it goes to

Construction—Contract.

CONSTITUTIONAL LAW—Continued.

the utmost stretch of the legislative power touching the subject. And the amendatory act of 1849, providing for the transfer of the land to the occupying claimant without the *consent* of the owner, is in plain conflict with the 19th section of the first article of the constitution, which declares that "*private property shall ever be held inviolate*," etc., and is, therefore, by the unanimous opinion of the court, pronounced unconstitutional and void. *Ib.*

20. That the legislature of Ohio has no constitutional authority, in conferring special privileges on a corporation, to abridge or relinquish to any extent or in any manner whatsoever, by contract or otherwise, any portion of the power of taxation over its corporate property, has been settled by solemn adjudication, and is not now an open question in this state. *Milan & R. Plank-road Company v. Husted*, 578.
21. Where a court, in a criminal case, after a jury have retired to consult on their verdict, discharges them without the assent of the prisoner, and without the existence of a cause for which they might lawfully be discharged, the prisoner can not be again tried for the same offense. *Page v. The State*, 229.

See TAXES, 1, 2, 3, 5, 7.

CONSTRUCTION—

In the interpretation of a statute, the manifest reason and intention of a law should prevail, although at variance with the literal import of the language employed. *Slater v. Cave*, 80.

See CONTRACT, 3, 4; WILLS.

CONTRACT—

1. T. and M., partners in trade in the city of C., agree to dissolve partnership, M., the party retiring from the establishment, binding himself that he shall not, within five years, enter into or be concerned in the kind of business conducted or carried on by said firm, or any branch thereof, within the said city, or interfere in any way with any agency before established by the firm, or establish any similar agency that may interfere or compete with any agency of the firm or of the party succeeding to its business upon its dissolution, whether such agencies be established in the said city or elsewhere. *Held*:

That such a contract was reasonable and proper, so far as it restrained M. from engaging for a limited time in the city of C., in the business theretofore pursued by the firm. *Thomas v. Miles*, 274.

2. But so far as it attempts to prevent M. from interfering or competing with any branches that T. might establish, at any and all other places, it is clearly opposed to public policy, and is therefore void. *Ib.*
3. Such a covenant is divisible, and it does not constitute a breach of its legal obligation, if, within the time limited, M. should become employed at a distant point as an agent, or otherwise, in the business in which the firm was engaged. *Ib.*
4. When a note is given by A to B, by which A promises to pay B a sum of money, upon full proof of a breach of covenant entered into on the same day by A with B, and the agreement containing the covenant refers to the note, the agreement and note, though on different pieces of paper, are to be considered as but one agreement. *Berry v. Wisdom*, 241.
5. Where the note is to be paid upon full proof of a breach of the agreement on the part of A, and the agreement contains several covenants to be performed by A, some of more and some of less importance than others, and the actual amount of damages which B would sustain by a breach of some of the covenants would be easily ascertained, the sum mentioned in the note is not to be considered as liquidated damages, but in the nature of a penalty. *Ib.*
6. Where the apparent intention of the parties to a contract is to have new machinery made, and old machinery repaired, and put into running order, for a single purpose, of which work a part is not to be done without the whole,

Corporations—Courts.

CONTRACT—Continued.

and all the parts bear a necessary relation to each other, and where the provision for payment indicates that the parties themselves regard the agreement as an entirety, their intention prevails over any technical rules of construction, and the contract is to be taken as an entirety. *S. B. Wells-ville v. Geisse*, 333.

7. In such a case, the mechanic can not, by suing on part of the contract which he claims to have fully performed, and declaring under the *quantum meruit*, as to the work not paid for, cut off the defendant's right to *recoupe* the damages on the whole. *Ib.*

See WATER-CRAFT.

CORPORATIONS—

Corporations are liable for injuries arising from the negligence or carelessness of their agents and officers, in the course of their employment, in the same manner, and to the same extent, as private individuals. *C. C. & C. R. R. Co. v. Keary*, 201.

See RAILROAD COMPANIES; TAXES.

COURTS—**I. DISTRICT COURT.**

1. Under the new judicial system, established by the constitution of 1851, and the enactments under it, the district court has no jurisdiction, on the election of the defendant or otherwise, to try cases of murder, unless they were pending in the old Supreme Court, and went to the district court by the transfer provided in the constitution, as pending business. *Parks v. The State*, 101.
2. When a writ of error is allowed by the Supreme Court in term, returnable to a district court, it issues out of the Supreme Court; but when it is allowed by a judge in vacation, returnable as above, it issues from the clerk's office of the district court. *Ohio, use, etc. v. Beam*, 508.
3. Where relief can be had in the district court, it should be sought there, unless there is some special and sufficient reason for coming into the Supreme Court. *Benham v. Conklin*, 509.

II. COMMON PLEAS.

1. The rules and presumptions usually applied to the records of courts of general jurisdiction apply to proceedings of the old court of common pleas in Ohio, on petition by executors or administrators for the sale of real estate to pay debts. *Sheldon v. Newton*, 494.
2. That court was one of record, of general common-law and chancery jurisdiction; and while, in the exercise of this particular authority, it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered that it was the tribunal created by the constitution with the exclusive jurisdiction over probate matters, and had no one single characteristic of those inferior courts and commissions to which the opposite rules to those before mentioned, have been applied by the English and American courts. *Ib.*
3. The constitution confers no jurisdiction whatever upon the court of common pleas, in either civil or criminal cases. *Stevens v. The State*, 453.
4. It is made capable of receiving jurisdiction in all such cases, but can exercise none, until conferred by law. *Ib.*
5. The act of May 1, 1854, to abolish the criminal court in Hamilton county, and to transfer its unfinished business to the court of common pleas in the first district, has conferred the same criminal jurisdiction upon that court as is conferred by law upon the courts of common pleas in other counties of the state. *Ib.*
6. And this, without regard to the question, whether the act is available to abolish the criminal court, and to vacate the office of its judge. *Ib.*
7. Parts of an enactment, when capable of separation, may be valid and

Covenant—Deed.

COURTS—*Continued.*

- effectual, while other parts may be void, by reason of their repugnancy to a constitutional provision. *Ib.*
8. This act gives the common pleas no power over the process of the criminal court, and no right to employ the grand jury, summoned for that court. *Ib.*
 9. An indictment found in the common pleas, by such a grand jury, is illegal, and a plea in abatement for that cause sufficient. *Ib.*

III. PROBATE COURT.

1. The general rule established by "an act defining the jurisdiction, and regulating the practice of probate courts," is that prosecutions shall originate in a proceeding before some officer, who can hear testimony, and decide upon its sufficiency to put the accused on his defense, before the probate court. *Gates & Goodno v. The State*, 293.
2. Such a proceeding before an examining magistrate is necessary to confer jurisdiction on the probate court, of all charges which may be brought before it, unless the "act to prevent the adulteration of alcoholic liquors" (*Derby's Swan*, 479a), has made a particular exception in respect of the offenses it defines. *Ib.*
(Whether such an exception can be made. *Quære*, by Warden, J.)
3. The jurisdiction being conferred, the information takes the place of an indictment, and, within the limits in which an indictment may vary the charge, and still subject the accused to the consequences of a default on his recognizance taken by a magistrate, the information may vary or depart from the charge set forth in the transcript or recognizance. *Ib.*

COVENANT. See CONTRACT, 4, 5.

CRIMES. See MURDER; FORGERY; LIQUORS, SALE OF INTOXICATING; RECEIVING STOLEN GOODS; INDICTMENT.

CRIMINAL COURT OF HAMILTON COUNTY. See COURTS.

CROPS. See GROWING CORN.

DAMAGES. See LIQUIDATED DAMAGES.

DEBT—

The provision in the act of March 8, 1831 (*Swan's old ed.* 652), that a recognizance minuted on the journal, "shall be considered as of record in such court, and proceeded on by process issuing out of said court, in the same manner as if such recognizance had been entered into before said court," did not require that an action of debt on such recognizance should be commenced by process issuing out of said court. *The State v. West*, 509.

DEED—

1. An acknowledgment of a deed taken by a mayor without the limits of his city is valid. *Moore v. Moore's Lessee*, 154.
2. The record of a deed is *prima facie* evidence of its delivery. *Mitchell v. Ryan*, 377.
3. Such *prima facie* case may be rebutted by proof. *Ib.*
4. A delivery of a deed may be to a stranger for the use of a grantee. *Ib.*
5. It must appear that such delivery was for the grantor's use. But no precise form of words is necessary to the declaration of this purpose. Anything that shows the purpose is enough. *Ib.*
6. When a man executes and acknowledges a deed, and delivers it to the recorder, with unqualified instructions to record it, the reasonable presumption, in the absence of any rebutting circumstance, is, that he means to part with his title. *Ib.*
7. The fact of a grantor's possession of a deed, after an alleged delivery of it, may be a very pregnant circumstance, to show that the supposed delivery was not absolute. But such possession of a recorded deed is entitled to much less consideration than the possession of a deed not recorded. *Ib.*

Deposits—Dower.

DEED—*Continued.*

8. Clear proof ought to be made to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title. *Ib.*
9. It is a general rule that acceptance by the grantee is necessary to constitute a good delivery. *Ib.*
10. But where a grant is plainly beneficial to the grantee, his acceptance of it is presumed in the absence of proof to the contrary. *Ib.*
11. And when a grant is a pure, unqualified gift, the presumption of acceptance can be rebutted only by proof of dissent. *Ib.*
12. Growing corn may be reserved by parol from the operation of a deed in common form, for the land whereon it grows. *Baker v. Jordan*, 438.
13. If the parties to a deed, either by words or in their behavior, signify their understanding that, as between them, the crop is personalty, the law will so regard it, and will respect their intention in the construction of the deed. *Ib.*
14. When the evidence of such understanding is produced, it is not to contradict the deed, for with that, it is perfectly consistent; but it is to show that what in some instances would go with the land as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect. *Ib.*

DEPOSITS—

Moneys deposited with a bank or banker (unless *specially* deposited) become the moneys of the bank or banker, appertaining to the business of banking, and proper to be listed with the other moneys belonging to that business; and this is equally true of general deposits, whether they happen to be used in the discounting of paper, or held in reserve to pay probable current demands. *Ellis & Morton v. Linck*, 66.

DESCENT AND DISTRIBUTION—

1. The "ancestor" meant by the act "regulating descents and the distribution of personal estates" (*Swan*, old ed., note *a*, 386), was any one from whom the estate was inheritable. *Lessee of Prickett v. Parker*, 394.
2. The "ancestor from whom the estate came," was he from whom it was immediately inherited. *Ib.*
3. E. P. purchased certain lands, and died intestate, leaving I. P. and J. P., his sons and heirs; and R., his widow, married again. Before the birth or conception of issue of the second marriage, I. P. died intestate, and without issue, being an infant. J. P. afterward died intestate, and without issue. At the time of *his* death, there was issue of the second marriage. *Held*, that, within the meaning of the said act, I. P. was the ancestor of J. P., from whom a moiety of the lands came to the latter; and that on the death of J. P. his half-brothers took that moiety, under the last part of the fourth clause in section 1 of the act cited. *Ib.*

DIVIDENDS. See WILLS.

DOWER—

1. In a proceeding for dower, the grantee of a deceased husband, and those holding under him, are not estopped to deny that their grantor had title. *Coakley v. Perry*, 344.
2. A mortgagor in possession, being seized of the legal title to the mortgaged premises until condition broken, and even then, as against all persons, except the mortgagee, the widow of the deceased mortgagor is entitled to dower therein. *Carter v. Goodin*, 75.
3. The wife of the grantee in a conveyance of the legal title to real estate, is entitled to her contingent estate in the premises, although a mortgage was given by the husband for the purchase money at the time of his receiving the conveyance. *Ib.*
4. Where the vendee of real estate, in compliance with the terms of his contract in the payment of a part of the purchase money, satisfies a debt of his

Election of Remedies—Equity.

DOWER—Continued.

vendor, secured by a subsisting mortgage on the premises, given by the vendor, and in which his wife joined, to the person from whom he derived title, and causes the mortgage to be released on the record at the time by the mortgagee, no interest under the mortgage, or by means of the transaction, accrues to the vendee in bar of the contingent dower estate of the wife of the vendor. *Ib.*

ELECTION OF REMEDIES. See EQUITY, 6.**ENCLOSURES.** See CATTLE.**EQUITY—**

1. A demurrer will be sustained to a bill in chancery on the ground that the subject of the suit is too trivial to justify the resort to equity. *Carr v. Iglehart*, 457.
2. The fact that property subject to taxation has not been listed, although it improperly increases the burden of taxation upon that which is listed, does not render the tax wholly void, or authorize the interference of a court of equity. *Exchange Bank v. Hines*, 1.
3. The tax law of 1852, although it prescribes a different mode and greater rate of taxation than is provided for in the 60th section of the banking law of 1845, is not repugnant to the constitution of the United States. But if it were, a court of equity has no jurisdiction to restrain the collection of the tax by injunction, even though the county treasurer may individually be insolvent. For an action of trespass affords a complete remedy at law to recover a judgment, and the act of March 14, 1853, "to enforce the collection of taxes," etc., provides the means for the payment of such judgment. *Ib.*
4. Where, by the agreement of an attorney, without any other authority than his retainer to collect money by suit, a prior was postponed to a junior lien, the holder of the junior lien could not, without constructive fraud, employ the same attorney to consummate the preference improperly given to his lien, by instituting a proceeding in chancery, in which the attorney appeared and answered for the holders of the postponed lien (who had no actual notice of the proceeding), and, admitting the priority of what was really the junior lien, procured a decree accordingly. *Wilson v. Jennings*, 528.
5. Nor, in the absence of a particular express or implied authority for that purpose, could the attorney for the prior judgment creditors, bind his clients by an agreement with A, that A should bid off the land under the execution, and that without any payment of money, the sale should be returned and confirmed, and a deed executed to A, who should afterward sell the lands for the best price that could be had, and apply the proceeds so as to postpone the lien of the judgment creditors to a junior lien as aforesaid. *Ib.* 552.
6. The resort by the judgment creditors in such a case to an action at law in which they sought to recover the unpaid bid of A, to the extent allowed in the decree before mentioned, which stood in the way of a full recovery in that action, was no bar to a subsequent bill to impeach the said decree for fraud, and to obtain the complete satisfaction of the lien which had been improperly postponed. *Ib.*
7. Where a mortgage is given by the vendee of land to the vendor, to secure payment of the purchase money, the mortgagor has the same time in which to redeem, that he would have were the mortgage given upon any other consideration. *Robinson v. Fife*, 551.
8. Although, strictly speaking, there is no statute of limitations applicable to the right to redeem mortgaged premises in the possession of the mortgagee, yet courts of equity, acting on the analogy of the statute, would hold such right barred after a lapse of twenty-one years, where the mortgagee had, during all that time, held possession adversely to the mortgagor, and claiming to hold, not as mortgagor, but as owner. But he must hold the posses-

Equity.

Equity—Continued.

- sion in such manner, that if the legal title and right of possession had been in the mortgagor, the latter would have been barred of an action of ejectment. *Id.*
9. It is not the possession merely, but the nature of that possession, which operates in equity as a bar to redemption. So long as the mortgagee admits, or by his acts shows, that he holds as mortgagee, and not by any other right, time does not begin to run against the right to redeem. Thus, where the mortgagee, within twenty-one years before the filing of the bill to redeem, took a judgment for the mortgage debt, and filed a bill of foreclosure, the right of redemption is not barred. *Id.*
 10. A mortgagee brought ejectment on the mortgage against a purchaser from the mortgagor, and recovered. The defendant claimed the benefit of the occupying-claimant law, which was allowed, and valuations made pursuant to the statute. The plaintiff elected to take the value of the land, and tendered a deed. The defendant neither accepted the deed, nor paid the money, and nothing more was done under the act. *Held*, that these circumstances constituted no bar to the right to redeem. *Id.*
 11. The general rule is, that a mortgagor, or purchaser under him, seeking a redemption, must redeem the whole premises, the reason of which is, that the mortgagee will not be compelled to divide his security, and apportion his claim. But where the mortgagee has extinguished the right of redemption to a part of the premises, and become the absolute owner thereof, there may be a redemption of the other part; for in such a case the reason of the rule does not exist. *Id.*
 12. M. K. conveyed to M. K., Jr., and G. W. S., certain of his lands, part of the consideration being an agreement by the grantees to pay the debts due by the grantor at the mills and distillery, upon the property conveyed. To secure performance of this agreement, they reconveyed by way of recorded mortgage, in which some debts were named, and others referred to, without description, as specified in a certain schedule, which last was never recorded or delivered for record. Subsequently, and before the bringing of suit to impeach certain conveyances of M. K. as in fraud of creditors, the grantees aforesaid, doing business as partners, mortgaged part of the lands to E. & S., to secure a loan; and to make the security perfect, M. K. executed a release of the lien of his mortgage to E. & S. Prior to the commencement of the suit before mentioned, some of the schedule creditors surrendered the evidence of their claims on M. K., and in lieu thereof, took the notes of M. K., Jr., and G. W. S., which remain unpaid. *Held*: 1. That the said schedule creditors could not impeach the conveyance to M. K., Jr., and G. W. S. Had the creditors retained the evidence of their claims upon M. K., the presumption would be that the notes of his grantees were collateral securities; but as they surrendered these evidence of indebtedness when they took the notes of third persons, the presumption is just the contrary. 2. But it is fairly presumable that the surrender was made with an understanding that they were to have the benefit of the mortgage to M. K. That, under these circumstances, they are entitled to have all the securities for the payment of the money that M. K. had, is well settled. 3. It is a very serious question whether E. & S. were charged by the record of the mortgage with notice of the debts named in the unrecorded schedule. 4. The release of M. K. in favor of E. & S., was available for its purpose. *Crumbaugh v. Kugler*, 544.
 13. The same M. K., about the time of the conveyance sought to be impeached by his creditors, took into partnership his son J. K., who brought nothing into the partnership, and when it was dissolved, took nothing out. During the partnership, some of the complainants, who were creditors of M. K. at the date of his conveyance, took the notes of the firm of M. K. & Son for the amounts due them, some of which notes were subsequently, and after the dissolution of the firm, given up, and

Equity of Redemption—Estoppel.

EQUITY—Continued.

- the notes of the father again taken in lieu thereof. *Held*, that under all the circumstances, this case is clearly distinguishable from that first stated, as to the effect of the creditors giving up the original notes. The transaction was intended simply as a renewal. It does not militate against this idea, that J. K. become bound as well as his father; for a note with security may as well be a renewal of a former note, as one without security. *Ib.*
14. Where A had transferred his store of goods to B, upon certain trusts, in one of which the complainants below were beneficially interested, and had also assigned to B a contract for other property, for the express purpose of indemnifying said complainants, they had a right to call B to account in chancery, and it was not necessary, before doing so, to obtain a judgment against A. *Gilbert v. Sutliff*, 129.
 15. If, in a bill filed in such a case as that supposed, on an averment that B fraudulently holds in his possession, in trust for A, a large amount of real and personal estate, and is also largely indebted to him, it is sought to subject this property and indebtedness to the complainants' claims, the objections to the bill that it should have followed a judgment against A, should be taken at the hearing, if not before. It comes too late after final decree. *Ib.*
 16. A court is not bound to dismiss a bill on account of a misjoinder, where the defect is not specially pointed out. It may do so, *sua sponte*, or it may not. Whether it shall do so or not rests in its sound discretion. *Ib.*
 17. On a bill of review, a mere difference of opinion as to the weight of evidence, between the court which pronounced and that which reviews a decree founded on that evidence, will not warrant the reversal of the decree. *Tracey v. Sackett*, 1 Ohio St. 54, followed and approved. *Gazley v. Huber*, 399.

EQUITY OF REDEMPTION. See EQUITY AND MORTGAGE.

ERROR—

1. By the constitution and the act of February 19, 1852, for the organization of the courts, ample power was given to this court to review a judgment of the late Supreme Court on the circuit. *Groves v. Stone*, 576.
2. But the writ of error in such case must have issued within one year after the judgment. *Ib.*
3. A writ of error can not be allowed before final judgment in the court below. *Kinsely v. The State*, 508.
4. When a writ of error is allowed by the Supreme Court, in term, returnable to a district court, it issues out of the Supreme Court, but when it is allowed by a judge in vacation, returnable as above, it issues from the clerk's office of the district court. *Gerhard v. The State*.
5. The transcript mentioned in section 517 of the code, to be filed with a petition in error, is a complete transcript, and not a copy of the journal entries merely. *Jennings v. Mendenhall*, 489.
6. When relief can be had in the district court, it should be sought there, unless there is some special and sufficient reason for coming into the Supreme Court. *Benham v. Conklin*, 509.
7. A clerical error in the entry of a judgment may be corrected, on motion, at a subsequent term. *Ohio, use, etc. v. Beam*, 508.

ESTOPPEL—

1. The rule of estoppel applies in cases only where the grantee receives and holds possession, by virtue of the conveyance from the grantor, and relies upon it as the source of his title; it does not apply where the grantee already held under a prior and independent conveyance. *Coakley v. Perry*, 344.
2. In case of a petition for dower, the grantee of a deceased husband, and those holding under him, are not estopped to deny that their grantor had title. *Ib.*
3. A person in possession of real estate under a *bona fide* claim of title, has

Evidence.

ESTOPPEL—Continued.

the right to buy in any title, real or pretended, with a view to quiet the enjoyment of his possession; and the purchase of the adversary title, if it does not strengthen, can not impair his title. *Ib.*

EVIDENCE—**I. WITNESSES AND INSTRUMENTS.**

1. A boy under sixteen years of age, convicted of forgery in Hamilton county, and sentenced to confinement at hard labor in the House of Refuge, and to pay the costs of prosecution, is incompetent as a witness, so long as his sentence remains unreversed or otherwise unannulled. *Poage v. The State*, 229.
2. A waiver of objection to the competency of a witness so as to allow his deposition to be taken in a case, is a waiver during the whole progress of the cause, and the objection can not be insisted on when the witness is called to give a second deposition in the same cause. *Choteau v. Thompson & Campbell*, 424.
3. The practice in Ohio is to take the deposition of a defendant in chancery without leave; subject to the right of the party against whom it is taken to except to it. *Ib.*
4. On an issue before a jury on a separate plea of a surety, and also to assess the damages against other parties allowing judgment by default without plea, in a suit on a promissory note, the principal on the note allowing default for want of plea, is not a competent witness for the party pleading to the action, no separate judgment having been rendered against him. *Crowell v. W. Res. Bank*, 406.
5. Where defendants are sued as partners, and liable only as such, and where they had before that time been sued as such partners, and suffered judgment to pass against them by default as such by other persons, the record of such judgment may be given in evidence against them, as tending to prove the partnership. *Marks v. Sigler*, 358.

II. PRODUCTION, RELEVANCY, AND WEIGHT OF TESTIMONY.

1. An objection to a question and answer in the deposition of a witness, on the ground that the question is *leading* in form, is an objection, not to the substance or relevancy of the testimony of the witness, but to the form and manner of obtaining it, and should be made at the time the question was propounded, but if not made then, or within proper time before the cause is called for trial, it will fairly and reasonably be taken to have been waived. *Crowell v. W. Res. Bank*, 406.
2. The exceptions to the general rule, that a witness must depose only to facts within his knowledge, leaving the inference or understanding from the fact, to be gathered by the jury, relate to questions of science, skill, trade, identity of persons, etc., as to which witnesses have been allowed to express their opinion or belief. *Ib.*
3. The rule that a witness may state his *impression*, results from the fact that a witness can not be required to depose positively, when his recollection is not distinct and certain. But the impression of a witness, to be admissible as evidence, must be, not the result of a process of reason and judgment, but simply *facts impressed* on his memory, and of which his recollection is not sufficiently distinct to rise to *positive* assurance. *Ib.*
4. The testimony of a witness consisting of the narration of the conversation of a party, is always to be received with great caution. And to allow a witness, after the narration of a conversation, to state his *conclusions* or *understanding* from the conversation, as to the *meaning* or *understanding* of the parties to the conversation, would be a most dangerous relaxation of the rules of evidence. *Ib.*
5. It is competent to give in evidence, with a view to prove the existence of a partnership and the firm name, besides the verbal admissions, or ordinary business transactions and conduct of a party, testimony showing the acts

Execution.

EVIDENCE—Continued.

- of the party under the solemnity of his deed in the firm name, and relating to the partnership business, foreign to the particular transaction or contract which constitutes the foundation of the action. *Ib.*
6. In an action on an acceptance, in which, by proper plea, the defendants denied that they had accepted the bill, testimony was offered to show an admission by defendants, that they had become bound by acceptances in favor of the same drawer, on two bills, of which the plaintiff claimed that declared on to be one. To prove that the two bills, whose execution had been thus admitted, had returned to the defendants, the latter produced, and offered to put in evidence, two bills bearing date anterior to the admission, drawn by the same drawer, and shown to be signed with his signature, but did not prove, or offer to prove, that they had ever been in the drawer's hands, or that the defendants had ever become bound on them. *Held*, that the court properly rejected the bills so offered as evidence. *Hutchinson v. Canal Bank*, 490.
 7. One of the payees of a note having become bankrupt after transferring his interest to the others, suit may be brought in the name of all the payees for the use of those who are not bankrupt. When the payees do so unite, and on the trial of the case after proof by defendant of such bankruptcy, the plaintiffs introduce a paper purporting to be an assignment by the bankrupt to the other payees, bearing date before bankruptcy, the mere fact that the paper bears date before, is not evidence that it was executed on that day, without any other evidence of the time of execution. *Pugh's Adm'x v. Holliday*, 284.
 8. The record of a deed is *prima facie* evidence of its delivery. Lessee of *Mitchell v. Ryan*, 377.
 9. Such *prima facie* case may be rebutted by proof. *Ib.*
 10. A delivery of a deed may be to a stranger for the use of the grantee. *Ib.*
 11. It must appear that such delivery was for the grantee's use. But no precise form of words is necessary to the declaration of this purpose. Anything that shows the purpose is enough. *Ib.*
 12. When a man executes and acknowledges a deed, and delivers it to the recorder, with unqualified instructions to record it, the reasonable presumption, in the absence of any rebutting circumstance, is, that he means to part with his title. *Ib.*
 13. The fact of a grantor's possession of a deed, after an alleged delivery of it, may be a very pregnant circumstance to show that the supposed delivery was not absolute. But such possession of a recorded deed is entitled to much less consideration than the possession of a deed not recorded. *Ib.*
 14. Clear proof ought to be made to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title. *Ib.*
 15. Where a grant is plainly beneficial to the grantee, his acceptance of it is presumed in the absence of proof to the contrary. *Ib.*
 16. And when a grant is a pure, unqualified gift, the presumption of acceptance can be rebutted only by proof of dissent. *Ib.*
 17. It may be presumed from circumstances, that an order of court was made upon the motion of a particular person, where the record does not show who was the mover. *Creps v. Baird*, 277.

EXECUTION—

1. The conversion, by a justice of the peace, of the first execution on a judgment before him into an alias writ, by altering its date, is irregular, but can not destroy the protection due to the constable to whom it is delivered. The writ is not void. *Faris v. The State*, 159.
2. The owner of the chattel property, which is exempted by law from execution and sale for the payment of debts, is not divested of the right of disposing of it by pledge in security for the payment of his debts; and in case of a pledge or chattel mortgage, the owner clearly waives the benefit of

Executors and Administrators.

EXECUTION—Continued.

- exemption, so far as the incumbrance extends or is operative. *Frost v. Shaw*, 270.
3. Where, by the terms of a chattel mortgage, the mortgagee, at the maturity of his debt, has the right to the possession of the property, and he sees proper to reduce his debt to judgment, and then, through his agent, to turn out the mortgaged property, and have it sold under the authority of an execution for the payment of his debt, the debtor sustains no injury in the right of possession in the property, which would support an action of trespass, even although the chattels thus mortgaged and sold belonged to the enumerated articles exempted by law from execution. *Id.*
 4. There are certain enumerated articles which are absolutely exempted from execution, and which the officer is bound at his peril to notice and not take on execution, unless turned out by the debtor, by a waiver of his right of exemption; but there are other articles, the exemption of which from execution depends on the *selection* to be made by the debtor. *Id.*
 5. Where the exemption depends on the selection to be made by the debtor, the selection should be made at the time of the levy, if the debtor be present; but if not present, then it should be made and notice given to the officer within a reasonable time thereafter, and before sale. And without such selection, the right to the benefit of the exemption does not exist as to those articles which the statute authorizes the debtor to select. *Id.*
 6. In an action of trespass against an officer for a seizure and sale on execution of chattels, which are exempted by law from execution and sale, on the selection of the debtor, it is indispensable, in order to sustain the action, that the plaintiff should establish his right to the exemption, by proof of his selection of the property for the purposes contemplated by the statute. *Id.*
 7. Whatever may formerly and elsewhere have been the necessity for resistance to an officer, in certain cases, there is, at this day, and in this country, no want of the peaceful protection against a seizure, made in good faith by one clothed with public power, and subject to public responsibility. Nor is there any want of quiet, safe, and sure means to recover it when so taken. *Faris v. The State*, 159.
 8. Whenever the question of property is so far doubtful, that the creditor and officer may be supposed to act, and do, in truth, act without wantonness, carelessness, or oppression, but in good faith, and on reasonable grounds for believing the property to be that of the debtor, the owner has no right to resist the execution or attachment by a breach of the peace. *Id.*
 9. A levy and sale of land upon execution, will confer a title paramount to a prior assignment of the property made by the judgment debtor to a creditor to secure a debt which has not been acknowledged or recorded. *Fosdick v. Barr*, 471.

EXECUTORS AND ADMINISTRATORS—**I. PROCEEDINGS TO SELL REAL ESTATE.**

1. The proceeding authorized by the act of 1824, tested by its nature and essential qualities, would seem to be clearly enough a proceeding *in rem*. On the death of the owner, the law charged his debts as a specific lien on all his property, and held it subject to their payment. The legal title to the real estate descended to the heir subject to this paramount lien. The executor or administrator was a trustee alike for creditors and heir; and the order of sale upon his petition operated on the estate and not on the heir, and the purchaser, by operation of law, took the paramount title of the ancestor, and did not claim through or under the heir. *Sheldon v. Newton*, 494.
2. The heir was required to be made a party to the proceedings, with a view

Exemption.

EXECUTORS AND ADMINISTRATORS—Continued.

- to his having notice; but it is nowhere intimated, that a failure to give notice should deprive the court of jurisdiction over the property. *Ib.*
3. But whether the entire want of notice would warrant the collateral impeachment of the proceedings or not, no particular form of process or mode of giving notice to the defendants, was provided by statute. The necessity of giving any notice is only to be inferred from the fact that the heirs are required to be made defendants. *Ib.*
 4. This omission in the law had to be supplied by a course of practice in the several courts invested with the jurisdiction. *Ib.*
 5. In the case of minor heirs, the practice was general to serve the process upon the general guardian, or a guardian *ad litem*, or to permit an appearance, without process, by either. *Ib.*
 6. Decisions recognizing this practice as sufficient to fix the jurisdiction, have stood as the law of the state for more than twenty years. During all that time, they have constituted rules of property, and upon the faith of them men have invested their money. If ever an urgent case for the application of the maxim *stare decisis* existed, this is one. *Ib.*
 7. The title of a purchaser to real estate sold by an administrator to pay debts, is not divested by a subsequent reversal of the order of sale. *Irwin v. Jeffers*, 389.
 8. Notice to such purchaser, at the time of sale, that an effort would be made to reverse the order, does not affect the purchaser's title. *Ib.*
- See JURISDICTION.

II. RIGHTS AND DUTIES.

If an administrator purchases at his own sale, while the property remains in his hands, or in the hands of any purchaser from him with notice, the sale may be set aside in chancery at the election of the heirs, and the property again put up. *Sheldon v. Newton*, 494.

EXEMPTION—

1. The owner of the chattel property, which is exempted by law from execution and sale for the payment of debts, is not divested of the right of disposing of it by pledge in security for the payment of debts; and in case of a pledge or chattel mortgage, the owner clearly waives the benefit of exemption, so far as the incumbrance extends or is operative. *Frost v. Shaw*, 270.
2. Where, by the terms of a chattel mortgage, the mortgagee, at the maturity of his debt, has the right to the possession of the property, and he sees proper to reduce his debt to judgment, and then, through his agent, to turn out the mortgaged property, and have it sold under the authority of an execution for the payment of his debt, the debtor sustains no injury in the right of possession in the property, which would support an action of trespass, even although the chattels thus mortgaged and sold belonged to the enumerated articles exempted by law from execution. *Ib.*
3. There are certain enumerated articles which are absolutely exempted from execution, and which the officer is bound at his peril to notice and not take on execution, unless turned out by the debtor by a waiver of his right of exemption; but there are other articles, the exemption of which from execution depends on the *selection* to be made by the debtor. *Ib.*
4. Where the exemption depends on the selection to be made by the debtor, the selection should be made at the time of the levy, if the debtor be present; but if not present, then it should be made and notice given to the officer within a reasonable time thereafter, and before sale. And without such selection, the right to the benefit of exemption does not exist as to those articles which the statute authorizes the debtor to select. *Ib.*
5. In an action of trespass against an officer for a seizure and sale on execution of chattels, which are exempted by law from execution and sale, on the selection of the debtor, it is indispensable, in order to sustain the action, that the plaintiff should establish his right to the exemption, by proof

 Extinguishment—Fraud.

EXEMPTION—Continued.

of his selection of the property for the purposes contemplated by the statute. *Ib.*

EXTINGUISHMENT. See RELEASE.**FENCES—**

1. No law in Ohio prohibiting the owner of domestic animals from suffering them to run at large, except when unruly or dangerous, the owner of such animals, in allowing them to be at large on the range of uninclosed lands, is not chargeable with an *unlawful act*, or an omission of *ordinary care* in keeping his stock, doing nothing more than that which has been customary, and, by common consent, done by the people generally since the first settlement of the state, subject to the qualification, however, that animals which are unruly or dangerous are required to be restrained. *Kerwhacker v. C. & C. R. R. Co.* 172.
2. There is no law in this state requiring any person to fence or inclose his own lands; yet the person who leaves his grounds uninclosed, takes the risk of occasional intrusions thereon, by the animals of others running at large; and the owner of such animals allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident, from any danger into which they may happen to wander. *Ib.*
3. The right of a railroad company to the free, exclusive, and unmolested use of its railroad track, is nothing more than the right of every land proprietor, in the actual use and occupancy of his lands, and does not exempt the company from the duty enjoined by law upon every person, so to use his own property as not to do unnecessary injury to another. *Ib.*
4. There is no law in Ohio requiring railroad companies to fence their roads, but when they leave their roads open and uninclosed by sufficient fences and cattle-guards, they take the risk of intrusions upon their roads by animals running at large, as do other proprietors who leave their land uninclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident; and the company, in leaving its road unprotected by an inclosure, runs the risk of animals at large getting upon the road, without any remedy against the owner of the animals. *Ib.*

See RAILROAD COMPANIES, 2, 3, 4, 5; NEGLIGENCE, 1, 2, 3.

FI. FA. See EXECUTION.**FORGERY—**

1. The indorsement of a promissory note is the subject of forgery, under the crimes act. *Poage v. The State*, 329.
2. Section 22 of the act providing for the punishment of crimes, passed March 7, 1835 (1 Curwen, 189), is neither inconsistent nor repugnant. *Mackey v. The State*, 362.
3. An allegation of uttering a "false, forged, and counterfeited bank-note," is not bad for repugnancy. *Stoughton and Hudson's case*, 2 Ohio St., followed. *Ib.*
4. A surety, in signing his name on a promissory note below, or after the names of other persons have been placed on the note as co-sureties, although he does not thereby warrant, does in effect affirm the genuineness of the previous signatures, and can not avoid his liability to the payee, by showing that they had been forged to the note by the principal, but of which the creditor had no notice. *Selser v. Brock*, 302.

FRAUD—

1. A conveyance, by a fraudulent vendee of goods, in payment or security of the vendor's debt, requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property. *Webb v. Brown*, 246.
2. No just preference of creditors can be thus defeated; since, in every case in which the claim of the creditor is fair, the law would reward the greater

 Fraudulent Conveyance—Growing Corn.

FRAUD—Continued.

- vigilance of the creditor, and deny to any other creditor a preference resting in the favor or fraud of the vendor himself. *Ib.*
3. Nor can the vendor suffer by allowing such a right in his vendee; for, if the consideration remain unpaid, he can well question the amount to be paid by the vendee, if the whole fraud has been removed, on his own part; and if the consideration be wholly paid, the vendee would pay, at his own immediate expense and his own ultimate peril. *Ib.*
 4. The doctrine that a material alteration in a deed, or contract in writing, beneficial to the holder or party making the alteration, will vitiate the instrument, is founded on a presumption of fraud; and the alteration, to have such effect, must be such as to effect some change in the meaning or legal operation of the instrument. *Huntington & McIntyre v. Finch & Co.* 445.
 5. Where such alteration appearing on an instrument is not peculiarly suspicious and beneficial to the person seeking to enforce it, the alteration will be presumed to have been made either before the execution of the paper or by the agreement of the parties afterward. *Ib.*
 6. To an action brought by the trustee of an unauthorized banking company (Mechanics and Traders' Bank), the fact that the note sued on was given for stock, subscribed without any intention to pay it, merely for the purpose of pretending to the public that the stock was greater than it really was, or for the purpose of preventing the predominance of certain stockholders, is no defense. *Bates v. Lewis*, 459.
 7. Nor, under the common notice of set-off, could the defendant on such an action be allowed to set off against the claim, the amount paid by him since the commencement of the action, under execution, on a judgment rendered against him and others as partners in said bank. *Ib.*
- See EXECUTORS AND ADMINISTRATORS; RIGHTS AND DUTIES, 1; ATTORNEY; NEGOTIABLE PAPER.

FRAUDULENT CONVEYANCE. See SALES.**FUND COMMISSIONERS—**

Under the act of March 23, 1840, "to regulate the receipt and disbursement of the canal fund;" the act of March 10, 1843, "to re-organize the board of canal fund commissioners;" the act of March 2, 1846, "to prescribe the duties of the board of public works, canal fund commissioners," etc.; and the act of the same date, "to publish the embezzlement of public moneys, and for other purposes," there is not only no authority given to the fund commissioners to loan moneys under their control, but they are prohibited from doing so, and for a violation of duty in this particular, they are liable to the penalties provided in the second section of the act of 1846. *The State v. Butler*, 309.

GAMING—

1. Under the act for the prevention of gaming, of 1831, the loser of a bet may recover his money back, in an action founded upon the act, although commenced more than six months after the payment of the bet. *Hoss v. Layton*, 352.
2. The act gives the loser the exclusive right of action the first six months; after that, it gives it to any one, whether the loser or another, who first sues. *Ib.*

GIFT. See DEED.**GOODS AND CHATTELS.** See RECEIVING STOLEN GOODS.**GROWING CORN—**

1. Growing corn may be reserved by parol from the operation of a deed in common form, for the land whereon it grows. *Baker v. Jordon*, 438.
2. Growing corn may be part of the realty for some purposes, but it is generally to be considered as personality. *Ib.*
3. If the parties to a deed, either by words or in their behavior, signify their understanding that, as between them, the crop is personality, the law will

Incumbrance—Judicial Sales.

GROWING CORN—Continued.

so regard it, and will respect their intention in the construction of the deed. *Ib.*

4. When the evidence of such understanding is produced, it is not to contradict the deed; for with that, it is perfectly consistent; but it is to show that what in some instances, would go with the land as part of the realty, was, in that case, converted into personalty by will of the parties, and thus to hold the deed to its true meaning and effect. *Ib.*

INCUMBRANCE. See MORTGAGE.**INDICTMENT AND INFORMATION—**

1. It is not always indispensable to the sufficiency of an indictment for a statutory offense, that it describe the offense in the precise words of the statute. *Poage v. The State*, 229.
2. An indictment purporting to be by "the grand jurors of the State of Ohio inquiring of crimes and offenses within and for the county of Monroe," must be taken as found by a grand jury of that county, as well as for the state; it is, therefore, found by such a body as the law intends. *Mackey v. The State*, 362.
3. The general rule established by "an act defining the jurisdiction and regulating the practice of probate courts," is, that prosecution shall originate in a proceeding before some officer, who can hear testimony, and decide upon its sufficiency to put the accused on his defense before the probate court. *Gates & Goodno v. The State*, 293.
4. Such a proceeding before an examining magistrate is necessary to confer jurisdiction on the probate court, of all charges which may be brought before it, unless the "act to prevent the adulteration of alcoholic liquors" (*Derby's Swan*, 479a) has made a particular exception in respect of the offenses it defines. *Ib.*
5. The jurisdiction being conferred, the information takes the place of an indictment, and within the limits in which an indictment may vary the charge, and still subject the accused to the consequences of a default on his recognizance taken by a magistrate the information may vary or depart from the charge set forth in the transcript or recognizance. *Ib.*
6. An allegation of uttering a "false, forged, and counterfeited bank-note," is not bad for repugnancy. *Mackey v. The State*, 362.
7. *Nul tiel record* is not a proper replication to the plea of former conviction prescribed in the probate code. The proper replication is a general denial of the allegations of the plea; and the issue thus made up is to be tried by jury. *Miller & Gibson v. The State*, 475.

See Courts.

INFANCY—

When an infant purchases at an administrator's sale of lands, his purchase being in the interest of the administrator, and immediately conveys to the administrator, he can not disaffirm such sale on arriving at full age, as though the lands belonged to him. The law is perfectly settled, that an infant may absolutely and irrevocably execute a power, either by absolute deed, or otherwise, as fully and effectually as an adult. *Sheldon's Lessee v. Newton*, 494.

See JURISDICTION AT LAW, IN PARTICULAR CASES, 3, 4, 5, 6, 7, 8.

INFORMATION. See INDICTMENT AND INFORMATION**INSURANCE. See MUTUAL INSURANCE.****INTENDMENT. See INDICTMENT.****JEOPARDY. See CONSTITUTIONAL LAW, 21.****JUDICIAL SALES—**

1. The title of a purchaser to real estate sold by an administrator to pay debts, is not divested by a subsequent reversal of the order of sale. *Irwin v. Jeffers*, 389.

Jurisdiction.

JUDICIAL SALES—*Continued.*

2. Notice to such purchaser, at the time of sale, that an effort would be made to reverse the order, does not affect the purchaser's title. *Ib.*
3. A levy and sale of land upon execution will confer a title paramount to a prior assignment of the property, made by a judgment debtor to a creditor, to secure a debt, but not acknowledged or recorded. *Fosdick v. Barr*, 471.

See EXECUTORS AND ADMINISTRATORS; JURISDICTION; CAVEAT EMTOR.

JURISDICTION—

I. IN GENERAL.

1. The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented, which brings this power into action. *Sheldon's Lessee v. Newton*, 494.
2. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained. *Ib.*
3. When these appear, the jurisdiction has attached; the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally in question. *Ib.*
4. The proposition that the jurisdiction can be made to depend upon the record's disclosing such a state of facts to have been shown in evidence, as to warrant the exercise of its authority, was distinctly repudiated in the early case of *Ludlow's Heirs v. Johnston*, 3 Ohio. 560, and has been no less positively denied in every subsequent case, including *Adams v. Jeffries*, 12 Ohio, 253. This court wholly dissents from it, both on reason and on authority. *Ib.*

II. AT LAW IN PARTICULAR CASES.

1. The rules above stated (JURISDICTION IN GENERAL, 1, 2, 3, 4) apply to proceedings of the old court of common pleas, on petition by executors or administrators for the sale of real estate to pay debts. *Sheldon's Lessee v. Newton*, 494.
2. That court was one of record, of general common-law and chancery jurisdiction; and while, in the exercise of this particular authority, it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered that it was the tribunal created by the constitution with the exclusive jurisdiction over probate matters, and had no one single characteristic of those inferior courts and commissions, to which the opposite rules to those before mentioned, have been applied by the English American courts. *Ib.*
3. The proceeding authorized by the act of 1824, tested by its nature and essential qualities, would seem to be clearly enough a proceeding *in rem*. On the death of the owner, the law charged his debts as a specific lien on all his property, and held it subject to their payment. The legal title to the real estate descended to the heir subject to this paramount lien. The executor or administrator was a trustee alike for creditors and heir; and the order of sale upon his petition operated on the estate, and not on the heir, and the purchaser, by operation of law, took the paramount title of the ancestor, and did not claim through or under the heir. *Ib.*
4. The heir was required to be made a party to the proceedings, with a view to his having notice; but it is nowhere intimated, that a failure to give notice should deprive the court of jurisdiction over the property. *Ib.*
5. But whether the entire want of notice would warrant the collateral im-

 Legislation—Limitation of Actions.

JURISDICTION—Continued.

- peachment of the proceedings or not, no particular form of process, or mode of giving notice to the defendants, was provided by statute. The necessity of giving any notice is only to be inferred from the fact that the heirs are required to be made defendants. *Ib.*
6. This omission in the law had to be supplied by a course of practice in the several courts invested with the jurisdiction. *Ib.*
 7. In the case of minor heirs, the practice was general to serve the process upon the general guardian, or a guardian *ad litem*, or to permit an appearance, without process, by either. *Ib.*
 8. Decisions recognizing this practice as sufficient to fix the jurisdiction, have stood as the law of the state for more than twenty years. During all that time, they have constituted rules of property, and upon the faith of them men have invested their money. If ever an urgent case for the application of the maxim *stare decisis* existed, this is one. *Ib.*
 9. When, under the act of February 26, 1840, "providing for the collection of claims against steamboats and other water-crafts, and authorizing proceedings against the same by name," the remedy is pursued against the craft by name, the proceeding is *in rem*, and no other notice need be given, than that arising from its seizure. *Keating v. Spink*, 105.

III. IN EQUITY.

1. Even if the tax law of 1852 were unconstitutional, a court of equity has no jurisdiction to restrain the collection of the tax by injunction, even though the county treasurer may individually be insolvent. *Exchange Bank v. Hines*, 1
2. A demurrer to a bill will be sustained on the ground that the subject of the suit is too trivial to justify the resort to equity. *Carr v. Iglehart*, 457.
3. Where A had transferred his store of goods to B, upon certain trusts, in one of which the complainants below were beneficially interested, and had also assigned to B a contract for other property, for the express purpose of indemnifying said complainants, they had a right to call B to account in chancery, and it was not necessary, before doing so, to obtain a judgment against A. *Gilbert v. Sutliff*, 129.
4. If, in a bill filed in such a case as that supposed, on an averment that B fraudulently holds in his possession, in trust for A, a large amount of real and personal estate, and is also largely indebted to him, it is sought to subject this property and indebtedness to the complainants' claims, the objections to the bill that it should have followed a judgment against A, should be taken at the hearing, if not before. It comes too late after final decree. *Ib.*

LEGISLATION. See CONSTITUTIONAL LAW, 1, 2, 3.

LEVY. See EXECUTION.

LIMITATION OF ACTIONS—

1. The statute of limitations commences to run against an action which has accrued to a *feme sole*, at the age of eighteen years, the time when the disability of infancy is removed, and not three years thereafter, when she reaches the age of twenty-one years. *The State v. Cave*, 80.
2. In the interpretation of a statute, the manifest reason and intention of the law should prevail, although at variance with the literal import of the language employed. *Ib.*
3. In 1831, when the age of majority for females as well as males, in this state, was twenty-one years, the statute of limitations was enacted containing a saving clause in favor of certain disabilities, as follows: "That if any person, entitled to any other action" (except that of ejectment) "shall, at the time the cause of action accrued, be *within the age of twenty-one years, feme covert, insane, or imprisoned*, such person shall be at liberty to bring such action within the times limited, *after such disability shall be removed*."

 Liquidated Damages—Liquors, Sale of Intoxicating.

LIMITATION OF ACTIONS—Continued.

The law of 1834, fixing the age of majority of females at eighteen years and upward, altered, not the provision in the statute of 1831, but the subject-matter to which it was applicable, the words in the act of 1831, "within the age of twenty-one years of age," being equivalent to the words "within or under the age of majority," and the provision being intended to fix the period of the expiration of the age of minority as the time for the limitation to begin to run. *Ib.*

4. Under the act for the prevention of gaming, of 1831, the loser of a bet may recover his money back, in an action founded upon the act, although commenced more than six months after the payment of the bet. *Hoss v. Layton*, 352.
5. The act gives the loser the exclusive right of action the first six months; after that, it gives it to any one, whether the loser or another, who first sues. *Ib.*
6. The writ of error to review a judgment of the late Supreme Court on the circuit must have issued within one year from the time of the rendition of the judgment. *Groves v. Stone*, 576.

LIQUIDATED DAMAGES—

When a note is given by A to B, by which A promises to pay B a sum of money, upon full proof of a breach of covenant entered into on the same day by A with B, and the agreement contains several covenants to be performed by A, some of more, and some of less importance than others, and the actual amount of damages which B would sustain by a breach of some of the covenants could be easily ascertained, the sum in the note is not to be considered as liquidated damages, but in nature of a penalty. *Berry v. Wisdom*, 241.

LIQUORS, SALE OF INTOXICATING—

1. The "act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," was constitutionally enacted. *Miller & Gibson v. The State*, 475.
See CONSTITUTIONAL LAW, 1 to 5.
2. A violation of either the 1st, 2d, or 3d sections of the act, subjects the offender to the penalties mentioned in the first clause of section 8. It is not necessary, in order to incur these penalties, that all three sections be violated. *Ib.*
3. If a sale violate all three sections, the offender may be prosecuted under either of them; and his conviction or acquittal will bar a prosecution for the same sale under either of the other two sections. *Ib.*
4. But a conviction or acquittal under the 1st, 2d, or 3d sections is no bar to a prosecution under the 4th. *Ib.*
5. To convict for a violation of the second section, it is necessary to aver in the information, and prove on the trial, that the seller knew the buyer to be a minor; and to convict for a violation of the third section, it is necessary to aver and prove, in like manner, that the seller knew the buyer to be intoxicated, or in the habit of getting intoxicated. *Ib.*
6. To convict for a violation of the fourth section, it is necessary to aver in the information, and prove on the trial, that the place where the liquor was sold, was a *place of public resort*. And the proof must also show that it was a place where liquors were *habitually* sold in violation of the act. A single sale does not make the place a nuisance, or the seller a "keeper," within the meaning of the act. A series of sales is necessary. *Ib.*
7. No order to shut up or abate the place, can rightfully be made, unless the nuisance continues to exist at the time such order is made. Unless, therefore, the court is satisfied that, at the time of making the order, the place is kept for the sale of liquors in violation of the act, no order should be made. For it is the unlawful business (and not the place, *per se*), that creates the nuisance; and hence, where the business has ceased, there is

Master and Servant—Mortgage.

LIQUORS, SALE OF INTOXICATING—*Continued.*

no nuisance to abate. No man's property can be forfeited as a punishment for crime, the constitution providing that no conviction shall work a "forfeiture of estate." (Art. 1, sec. 12.) Hence there is no power to deprive a man of the use of his property, unless it be necessary in order to abate an *existing* nuisance. *Ib.*

8. The order is not to be directed to any officer. It is not an order to be executed by an officer. It is an order to the person convicted, obedience to which may be enforced, if the nuisance be continued, by attachment for contempt of court. The order being made, if the convict cease to keep a house of public resort, of the character named, or referred to, in the fourth section, he need give no bond, and having so ceased, no attachment can properly be issued against him. But if he desire to continue keeping such house of public resort, he must, in order to avoid an attachment, give bond. He has his election, to quit keeping a house of public resort, or to give bond, and keep it without violating the law. *Ib.*

9. A prosecution under this act can not be commenced in the probate court. *Ib.* See INDICTMENT AND INFORMATION, 3, 4, 5.

MASTER AND SERVANT. See RESPONDEAT SUPERIOR; RAILROAD COMPANY.

MAYOR. See DEED.

MISJOINDER. See PLEADING IN EQUITY, 4.

MONEYS AND CREDITS. See TAXES; DEPOSITS.

MORTGAGE—

1. An unrecorded mortgage or equitable assignment is good and effectual between the parties; but as to third persons, it takes effect, either at law or in equity, only from the time it is duly recorded. *Fosdick v. Barr* 471.
2. A mortgagor in possession, being seized of the legal title to the mortgaged premises, until condition broken, and even then, as against all persons except the mortgagee, the widow of a deceased mortgagor is entitled to dower therein. *Carter v. Goodin*, 75.
3. The wife of the grantee, in a conveyance of the legal title to real estate, is entitled to her contingent estate in the premises, although a mortgage was given by the husband for the purchase money, at the time of his receiving the conveyance. *Ib.*
4. Where the vendee of real estate, in compliance with the terms of his contract in the payment of a part of the purchase money, satisfies a debt of his vendor secured by a subsisting mortgage on the premises given by the vendor, and in which his wife joined, to the person from whom he derived title, and causes the mortgage to be released on the record, at the time, by the mortgagee, no interest under the mortgage, or by means of the transaction, accrues to the vendee, in bar of the contingent dower estate of the wife of the vendor. *Ib.*
5. Where a mortgage is given by the vendee of land to the vendor, to secure payment of the purchase money, the mortgagor has the same time in which to redeem, that he would have were the mortgage given upon any other consideration. *Robinson v. Fife*, 551.
6. Although, strictly speaking, there is no statute of limitations applicable to the right to redeem mortgaged premises in the possession of the mortgagee, yet courts of equity, acting on the analogy of the statute, would hold such right barred after a lapse of twenty-one years, where the mortgagee had, during all that time, held possession adversely to the mortgagor, and claiming to hold, not as mortgagor, but as owner. But he must hold the possession in such manner, that if the legal title and right of possession had been in the mortgagor, the latter would have been barred of an action of ejectment. *Ib.*
7. It is not the possession merely, but the nature of that possession, which operates in equity as a bar to redemption. So long as the mortgagee ad-

Murder—Negligence.

MORTGAGE—Continued.

mits, or by his act shows, that he holds as mortgagee, and not by any other right, time does not begin to run against the right to redeem. Thus, where the mortgagee, within twenty-one years before the filing of the bill to redeem, took a judgment for the mortgage debt, and filed a bill of foreclosure, the right of redemption is not barred. *Ib.*

8. A mortgagee brought ejectment on the mortgage against a purchaser from the mortgagor, and recovered. The defendant claimed the benefit of the occupying-claimant law, which was allowed, and valuations made pursuant to the statute. The plaintiff elected to take the value of the land, and tendered a deed. The defendant neither accepted the deed, nor paid the money, and nothing more was done under the act. *Held*, that these circumstances constituted no bar to the right to redeem. *Ib.*
9. The general rule is, that a mortgagor, or purchaser under him, seeking a redemption, must redeem the whole premises, the reason of which is, that the mortgagee will not be compelled to divide his security, and apportion his claim. But where the mortgagee has extinguished the right of redemption to a part of the premises, and become the absolute owner thereof, there may be a redemption of the other part; for in such a case the reason of the rule does not exist. *Ib.*
10. A mortgage lien to indemnify mortgagees against loss by reason of their having accepted drafts for the accommodation of the mortgagors, is not necessarily lost by a change of the evidence of liability, as where the first acceptances are taken up with the proceeds of like acceptances made for that purpose. *Choteau v. Thompson & Campbell*, 424.

See **EXECUTION**, 3; **RELEASE**; **EQUITY**, 12, 13.

MURDER—

1. In all trials for murder, the degree of the crime must be found as a matter of fact, and be specified in the verdict of the jury; and without an express finding, ascertaining the degree of the crime, the court is not authorized to inflict the punishment prescribed by law for either degree of the crime. *Dick v. The State*, 89.
2. On the trial of an indictment charging the crime of murder in the first degree, in the descriptive words of the statute, a verdict of "*guilty in manner and form as he stands charged in said indictment*," is insufficient. *Ib.*
3. A verdict of "*guilty in manner and form as charged in the first four counts of the indictment*," is not a sufficient finding on an indictment for murder in the first degree. The verdict must specifically find the degree of murder whereof the defendant is convicted. *Parks v. The State*, 101.

See **JURISDICTION**; **COURTS**, 1.

MUTUAL INSURANCE COMPANY—

Where a mutual insurance company was authorized, by an amendment to its charter, to issue policies upon cash premiums, at the election of the applicant, which was to be taken in lieu of a deposit note, and the fund arising therefrom, together with the deposit notes, were declared to be the capital of the company for the payment of losses and expenses—*Held*:

1. That the fund arising from cash premiums was subject to the same application as the premium notes, and could not be diverted to the payment of losses accruing before such premiums were received. *Ohio Mut. Ins. Co. v. Marietta Woolen Factory*, 348.
2. That an assessment for the whole amount of losses, accruing during the time such funds were received, made upon the deposit notes, without first exhausting the cash funds as provided by law, was illegal and void. *Ib.*

NEGLIGENCE—

1. The liability to make reparation for an injury by negligence, is founded upon an original moral duty enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another. *Kerwacker v. C. C. & C. R. Co.* 172.

Negotiable Paper—Occupying Claimants.

NEGLIGENCE—*Continued.*

2. The mere fact that one person is in the wrong, does not necessarily discharge another from the due observance of proper care toward him, or the duty of so exercising his own rights, as not to do him any unnecessary injury. *Ib.*
3. The doctrine that, in case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject to the following material qualifications, as appears from a review of the decisions both in England and this country, on this subject, to wit:
First. The injured party, although in fault to some extent, at the time, may, notwithstanding this, be entitled to reparation in damages for an injury which he has used ordinary care to avoid.
Second. When the negligence of the defendant in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission not occurring at the time of the injury, the action is maintainable.
Third. Where a party has in his custody or control dangerous instruments, or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress.
Fourth. And when the plaintiff, in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant, he is entitled to reparation on the ground that, although, in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing *ordinary care*, or, in other words, voluntarily incur the risk of injury by the defendant's *negligence*. *Ib.*
 See RAILROAD COMPANIES, 2, 3, 4, 5, and CATTLE, 1, 2, 3.

NEGOTIABLE PAPER—

1. A *bona fide* holder of negotiable paper, received by indorsement, or other proper mode of transfer, before due, for a valuable consideration, is protected against the defense which the maker might have against the original payee; yet, in this case, as in every other, it is the duty of every person to use ordinary care and prudence in his transactions, to prevent their operating to the prejudice of others. *McKesson v. Stanbery*, 156.
2. Whatever may be the rule where no fraud is shown to have been perpetrated on the maker by the original holder, in transferring the note, in a case which shows that the transfer on the part of the first holder was a positive fraud, it lies on the party claiming under such transaction, to show that he acted honestly, without knowledge of the fraud. *Ib.*

See BILL OF EXCHANGE AND PROMISSORY NOTES.

NIL DEBET. See PLEADING, 6.

NON OBSTANTE VEREDICTO. See PRACTICE, CIVIL PLEADINGS, 7.

NOTICE. See JURISDICTION; SURETY; BILL OF EXCHANGE AND PROMISSORY NOTES; MORTGAGE.

NUISANCE. See LIQUORS.

NUL TIEL RECORD. See PLEADING, 6.

OCCUPYING CLAIMANTS—

1. The statute for the relief of occupying claimants, passed March 10, 1831, requiring the value of the permanent improvements of the *bona fide* occupant, under color of title, to be paid as a condition precedent to the entry and possession of the owner, although an encroachment on the rights of private property as settled by the common law, rests upon a strong equity in favor of a compensation for improvements, which have augmented the value of the land, and inured to the benefit of the owner. *McCoy v. Grandy*, 463.
2. The option which this law gives to the owner of land, after a recovery in

Officers, Resisting—Parliamentary Law.

OCCUPYING CLAIMANTS—*Continued.*

- ejectment, either to take the land on paying for the improvements, or to take the amount of its value in money without the improvements, secures to the owner the property in the land, and at the same time protects the occupying claimant in his equitable claim, to a compensation for his improvements. *Ib.*
3. But the amendatory act of 1849, giving to the *occupying claimant* the option which the original act gave to the *owner* of the land, thus taking the property away from the owner after the solemn form of a recovery and judgment in ejectment, and transferring it to his unsuccessful adversary, who is ordered to be ejected as an intruder on the land, is a palpable invasion of the right of private property. *Ib.*
 4. In case of a mortgage, a judgment lien, a levy under an execution, assessment of a tax, or other incumbrance on land arising out of the owner's liabilities, it is not within the scope of the legislative power to take the fee in the land from the owner, and transfer it absolutely to the person holding the claim, while the owner stands ready and insists on discharging the liability and saving his property. *Ib.*
 5. The competency of the legislative power to transfer the property of one person to another, without the *consent* of the former, is not shown by any analogy, either to proceedings in partition, or the bar of the statute of limitations. In the case of the former, although the right of partition is an incident to the estate of tenancy in common, and the division the result of necessity, yet the owner is not divested of his property, without the opportunity of saving it, by a purchase; and in the case of the latter, the bar of the statute rests upon a rule of evidence raising a presumption that the title has passed, and upon this ground the aid of the judicial power is denied to one who has slept too long on his rights. *Ib.*
 6. The occupying-claimant law rests upon entirely different ground; and in securing to the occupant a compensation for his improvements, as a condition precedent to the restitution of the property to the owner, it goes to the utmost stretch of the legislative power touching the subject. And the amendatory act of 1849, providing for the transfer of the land to the occupying claimant without the *consent of the owner*, is in plain conflict with section 19 of article 1 of the constitution, which declares that "*private property shall ever be held inviolate*," etc., and is, therefore, by the unanimous opinion of the court, pronounced unconstitutional and void. *Ib.*

OFFICER, RESISTING—

1. Whatever may formerly and elsewhere have been the necessity for resistance to an officer, in certain cases, there is, at this day, and in this country, no want of the peaceful protection of property against a seizure, made in good faith by one clothed with public power, and subject to public responsibility. Nor is there any want of quiet, safe, and sure means to recover it when so taken. *Faris v. The State*, 159.
2. Whenever the question of property is so far doubtful, that the creditor and officer may be supposed to act, and do in truth act, without wantonness, carelessness, or oppression, but in good faith, and on reasonable grounds for believing the property to be that of the debtor, the owner has no right to resist the execution or attachment by a breach of the peace. *Ib.*
3. The conversion, by a justice of the peace, of the first execution on a judgment before him, into an alias writ, by altering its date is irregular, but can not destroy the protection due to the constable, to whom it is delivered. The writ is not void. *Ib.*
4. Whether an indictment for resisting an officer must not set forth, in words or substance, the process on which the officer acted, describe the manner of executing the writ and of the resistance, and aver the knowledge of the defendant that the officer was such—*quære*. *Ib.*

PARLIAMENTARY LAW. See CONSTITUTIONAL LAW, 1, 2, 3.

 Parol—Pleading.

PAROL. See DEED, 12, 13, 14.

PARTIES. See BANKRUPTCY; PLEADING.

PARTITION—

The statute regulating appeals to the district court, passed March 23, 1852, authorized an appeal on petition for partition. *Mack v. Bonner*, 366.

PARTNERSHIP—

1. It is competent to give in evidence, with a view to prove the existence of a partnership and the firm name, besides the verbal admissions, or ordinary business transactions and conduct of a party, testimony showing the acts of the party under the solemnity of his deed in the firm name and relating to the partnership business, foreign to the particular transaction or contract which constitutes the foundation of the action. *Crowell v. W. Res. Bank*, 406.
2. Where defendants are sued as partners, and liable only as such, and where they had before that time been sued as such partners, and suffered judgment to pass against them by default as such by other persons, the record of such judgment may be given in evidence against them, as tending to prove the partnership. *Marks v. Sigler*, 358.

PLEADING—

I. IN CIVIL CASES AT LAW.

1. When a declaration charges a railroad company with obstructing a public street adjoining the residence of plaintiff, and thereby preventing a free passage to and from his dwelling-house; that the company kept up dangerous fires; generated and deposited about his premises noxious vapors and smoke; jarred and disjointed his house; made the residence unwholesome and uncomfortable, and that the railroad company did these things *unlawfully*, and with intent to injure the plaintiff, a good cause of action is shown. *Parrott v. C. H. & D. R. R. Co.* 330.
2. A demurrer to such a declaration is not well taken. *Ib.*
3. The court on such demurrer can not determine whether the company has power to do such things or not at that particular place. *Ib.*
4. If the acts of the company were lawful, the company must show that fact by plea, or in some other way, on the trial of the cause. *Ib.*
5. In an action of debt upon a forfeited recognizance, a plea that the surety and prisoner were present at the appearance term, and that by their consent the case was continued until the next term, and that the surety then and there agreed to stand bail for the prisoner's appearance at the then next term, and that after the continuance the prisoner was called and the recognizance forfeited, is not a good plea in bar. *Swank v. The State*, 429.
6. In an action of debt upon a recognizance, where the defendant pleads nul tiel record and nil debet, and the finding of the court is on the plea of nil debet only, and nothing is said about the plea of nul tiel record, it is a finding in substance that there was such a record, for the reason that the existence of the record was necessarily involved in the issue of nil debet. *Ib.*
7. When a plea is so defective that the court, if the plea was found to be true, would be bound to enter judgment *non obstante veredicto*, the defendant is not prejudiced by the court or jury not passing upon such plea. *Ib.*
8. Unsettled as were for a long time the limits within which it could be made available, as well as the condition of its exercise, the right of recoupment has at length become fixed and certain in England, as well as in most of our sister states, and it must now be recognized as a part of the law of Ohio. *S. B. Wellsville v. Geisse*, 333.
9. Recoupment, however, even as enlarged in its meaning by modern usage, signifying nothing more than a reduction of damages, the right can not be exercised under a plea, the office of which is to set up a complete bar. Notice of the intention to *recoupe* must be given specially. *Ib.*

Power—Practice.

PLEADING—Continued.

10. In an action on a promissory note or bill of exchange, made payable to several payees, one of them having become bankrupt, the assignee in bankruptcy must be a party plaintiff with the other payees, and not the bankrupt himself. *Pugh's Adm'x v. Holliday*, 284.
 11. If the bankrupt before decree has assigned a chose in action, so as to pay all the beneficial interest to his assignee, suit may be brought in the name of the bankrupt for the use of his assignee. *Ib.*
 12. When one of the payees has become bankrupt after having transferred his interest in a note to the other payees, suit may be brought in the name of all the payees, for the use of those who were not bankrupt. *Ib.*
- See FRAUD; GAMING.

II. IN EQUITY.

1. A demurrer will be sustained to a bill in chancery on the ground that the subject of the suit is too trivial to justify the resort to equity. *Carr v. Iglehart*, 457.
2. Where A had transferred his store of goods to B, upon certain trusts, in one of which the complainants below were beneficially interested, and had also assigned to B a contract for other property, for the express purpose of indemnifying said complainants, they had a right to call B to account in chancery; and it was not necessary, before doing so, to obtain a judgment against A. *Gilbert v. Sutcliffe*, 129.
3. If, in a bill filed in such a case as that supposed, on an averment that B fraudulently holds in his possession, in trust for A, a large amount of real and personal estate, and is also largely indebted to him, it is sought to subject this property and indebtedness to the complainants' claim, the objection to the bill that it should have followed a judgment against A, should be taken at the hearing, if not before. It comes too late after final decree. *Ib.*
4. A court is not bound to dismiss a bill on account of a misjoinder, where the defect is not specially pointed out. It may do so, *sua sponte*, or it may not. Whether it shall do so or not, rests in its sound discretion. *Ib.*

III. IN CRIMINAL CASES.

See INDICTMENT.

POWER. See INFANT.

PRACTICE—

I. IN CIVIL CASES AT LAW.

1. When a plea is so defective that the court, if the plea was found to be true, would be bound to enter judgment, *non obstante veredicto*, the defendant is not prejudiced by the court or jury not passing upon such plea. *Swank v. The State*, 429.
- See PLEADING, CIVIL, AT LAW, 6.
2. It is not error to refuse to order the plaintiff, in an action against an indorser, to fill up the indorsement before judgment. *Greenough v. Smead*, 515.
3. The discretionary control of the court of common pleas over its own orders and judgments during the term at which they are entered, ends with the term; and the power of the court to set aside or vacate its judgments subsequent to the judgment term, is governed by settled principles, to which the action of the court must conform, and for a departure from which, a judgment or order of the court may be subject to reversal on proceedings in error. *Huntington & McIntyre v. Finch & Co.* 445.
4. A judgment may be set aside on motion, at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered. And in a proceeding of this kind, the court exercises an equitable jurisdiction, and should not vacate a judgment or order against the right and justice of the case. *Ib.*

Practice.

PRACTICE—Continued.

5. A warrant of attorney to confess a judgment executed by the principal and surety on a note or bill, although in its terms authorizing a joint judgment against principal and surety, may be a good power to take a judgment against the principal alone. *Ib.*
6. The transcript mentioned in section 517 of the code, to be filed with a petition in error, is a complete transcript, and not a copy of the journal entries merely. *Jennings v. Mendenhall*, 489.
7. A clerical error in the entry of a judgment may be corrected, on motion, at a subsequent term. *Ohio*, for use, etc. *v. Beam*, 508.

II. IN CHANCERY.

1. A waiver of objection to the competency of a witness, so as to allow his deposition to be taken in a case, is a waiver during the whole progress of the cause, and the objection can not be insisted on when the witness is called to give a second deposition in the same cause. *Choteau v. Thompson & Campbell*, 424.
2. The practice in Ohio is to take the deposition of a defendant in chancery without leave, subject to the right of the party against whom it is taken to except to it. *Ib.*
3. A court is not bound to dismiss a bill on account of a misjoinder, where the defect is not specially pointed out. It may do so, *sua sponte*, or it may not. *Gilbert v. Sutliff*, 129.

See JURISDICTION IN EQUITY.

III. IN CRIMINAL CASES.

1. A recognizance in a criminal case conditioned "that the prisoner appear at the next term and thereafter, from day to day, and abide the judgment of the court, and not depart the court without leave," binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourns without making any order, the sureties are exonerated from their recognizance. *Swank v. The State*, 429.
2. During the appearance term a new recognizance should be taken, or the prisoner committed to the jail of the county. *Ib.*
3. Such recognizance may be taken either at the time of the continuance, or at any day thereafter during the term, and the prisoner may be called for that purpose after the continuance of the case, and if he fails to appear, his recognizance may be forfeited. *Ib.*
4. The provision in the said section 16, for the signing and sealing of the sort of recognizance therein contemplated, can not have the effect of requiring the signatures and seals of the parties to a recognizance taken by a judge or a court. *The State v. West*, 509.
5. The last clause of the section of the act of March 7, 1831, conferring on a single judge the power to take bail, provides a convenient, but by no means necessary, mode of bringing the prisoner before him. The warrant for that purpose is not essential to his jurisdiction; if the sheriff voluntarily produce the prisoner, the whole object of the statute is accomplished. *Ib.*
6. No transcript need accompany a recognizance taken by a judge. The recognizance itself is a record, and a full one, if it is what the law requires. *Ib.*
7. An associate judge was confined to the statutory enumerations of cases in which he might let to bail. Unless he acted on habeas corpus, or on surrender of the principal by bail, his jurisdiction was limited by the act of March 7, 1831. (*Swan*, old ed. 727.) He could only let to bail, when the accused was confined on the mittimus of a judge or justice of the peace, or under capias on indictment. *Ib.*
8. When a writ of error is allowed by the Supreme Court, in term, returnable to a district court, it issues out of the Supreme Court, but when it is allowed

Presumption—Railroad Companies.

PRACTICE—Continued.

by a judge in vacation, returnable as above, it issues from the clerk's office of the district court. *Gerhard v. The State*, 508.

9. A writ of error can not be allowed before final judgment in the court below. *Kinsely v. The State*, 508.

See CONSTITUTIONAL LAW, 21.

PRESUMPTION. See DEED; BILL OF EXCHANGE AND PROMISSORY NOTES.

PRINCIPAL AND AGENT. See RESPONDEAT SUPERIOR.

PROBATE COURT. See COURTS.

PROCESS. See EXECUTION.

PROMISSORY NOTE. See BILL OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC MONEYS—

1. When any officer or agent of the State of Ohio, charged by law with the custody and disbursement of the public money, delivers any part of it to a private person or a corporation, for use, to be repaid with interest at a future time, though the bond or other instrument evidencing the obligation to repay may denominate such disposition of the money a "deposit," it is nevertheless, in substance and legal effect a loan, which upon its face established the relation of borrower and lender. *The State v. Buttles*, 309.

2. The policy of this state, in view of all of our statutes regulating the collection, safe-keeping, and disbursement of the public money, has always been to prohibit its officers and agents from loaning or dealing in its funds, on public or private account; a few exceptions where officers have been authorized, by special statutes, to loan or otherwise improve particular funds, only make the general rule the more manifest. *Ib.*

PUBLIC POLICY. See CONTRACT.

RAILROAD COMPANIES—

1. These companies are liable for injuries arising from the negligence and carelessness of their agents and officers, in the course of their employment, in the same manner, and to the same extent, as private individuals. *C. C. & C. R. R. Co. v. Keary*, 201.

2. The right of a railroad company to the free, exclusive, and unmolested use of its railroad track, is nothing more than the right of every land proprietor, in the actual use and occupancy of his lands, and does not exempt the company from the duty enjoined by law on every person, so to use his own property as not to do any unnecessary injury to another. *Kerwhacker v. C. C. & C. R. R. Co.* 172.

3. No law in Ohio requires railroad companies to fence their roads; but when they leave them open and uninclosed by sufficient fences and cattle-guards, they take the risk of intrusions upon their roads by animals running at large, as do other proprietors who leave their land uninclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident; and the company, in leaving its road unprotected by an inclosure, runs the risk of animals at large getting upon the road, without any remedy against the owner of the animals. *Ib.*

4. Having left its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals accidentally getting upon the railway track, it is the duty of the railroad company, acting through its agents, to use at least ordinary and reasonable care to avoid unnecessary injury to the animals, when found in the way of a train on the road. *Ib.*

5. The paramount object of the attention of agents of the company is due regard for the safety of persons and property on the train; and so far as consistent with this paramount duty, they are bound to the exercise of what, in that particular business, would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road;

Real Property—Recognizance.

RAILROAD COMPANIES—*Continued.*

and for any injury to animals arising from a neglect of such care, the company is liable in damages to the owner. *Ib.*
See NEGLIGENCE, 1, 2, 3.

6. The maxim, *respondet superior*, applies where a railroad company place a brakeman in their employ under the control of the conductor, the latter having the exclusive command of the train, and the brakeman, without fault on his part, is injured by the carelessness of the conductor. In such case the brakeman is entitled to recover of the company for the injury; the conductor being the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care. *C. C. & C. R. R. Co. v. Keary*, 201.
7. But the company is not liable to one in its employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion. *Ib.*
8. The distinction arises from the nature of the relation of master and servant, and from the express and implied obligations incident to the contract of service. As between *them*, the company undertakes to furnish suitable machinery and apparatus, and control it with prudence and care. The servant undertakes to obey and perform as he is directed—the company, reserving to itself the power of control, as between it and the servant, assumes the obligation to do it with care and skill; and a failure to do so, whether arising from the fault of the corporation, or its representative appointed for the purpose, is a breach of this obligation. *Ib.*
9. But when the failure occurs in that branch of the service committed by the principal to their subordinate servants, it is their fault, and not that of their employer, and a breach of their obligations, and not his; and where they enter the service with a knowledge that several are to be engaged, each takes upon himself the hazards of the employment, including that of negligence by his fellow-servants, and public policy requires that they should be interested in exercising supervision over each other. *Ib.*

See RESPONDEAT SUPERIOR.

REAL PROPERTY. See DOWER; MORTGAGE.

RECEIVING STOLEN GOODS—

Coin is embraced in the terms "goods and chattels," as used in section 26 of the crimes act. *Hall v. The State*, 575.

RECOGNIZANCE—

I. IN CRIMINAL CASES.

1. The provision in section 16 of "an act concerning mesne process in civil and criminal cases" (Swan, old ed. 722), for the signing and sealing of the sort of recognizance therein contemplated, can not have the effect of requiring the signatures and seals of the parties to a recognizance taken by a judge or a court. *The State v. West*, 509.
2. Sections 13, 14, 15, 16, though not free from inaccuracies and obscurities, must be construed to contemplate the arrest of one not yet in custody, and to provide only for a recognizance to be taken by some officer "charged with the duty of arresting" a person indicted. *Ib.*
3. The last clause of the section of the act of March 7, 1831, conferring on a single judge the power to take bail, provides a convenient, but by no means necessary, mode of bringing the prisoner before him. The warrant for that purpose is not essential to his jurisdiction; if the sheriff voluntarily produce the prisoner, the whole object of the statute is accomplished. *Ib.*
4. No transcript need accompany a recognizance taken by a judge. The recognizance itself is a record, and a full one, if it is what the law requires. Section 4 of the act of 1848, 46 Ohio L. 95, explained. *Ib.*
5. Nor is the indorsement by clerk or prosecuting attorney, of the time of

Record—Recompment.

RECOGNIZANCE—*Continued.*

- filing the recognizance, essential to its validity, or to its becoming a record. The object of requiring that indorsement is merely to cut off the fees of any officer who may delay or neglect his duty in returning the recognizance. *Ib.*
6. Under the act of 1848 (cited), the recognizance becomes a record in contemplation of law, when the indorsement of its forfeiture is made by the clerk. *Ib.*
 7. An acknowledgment, signed and sealed by the accused and two others, at the foot of which the judge wrote the words "attested and approved," was not a recognizance, but was unauthorized and void. *Ib.*
 8. Where no discharge followed the taking of such a paper, although it was filed, and the judge, disregarding that acknowledgment, proceeded to take a recognizance in form, the latter was not invalidated by the mistake or inadvertence of the judge in taking and filing the former. *Ib.*
 9. An associate judge was confined to the statutory enumerations of cases in which he might let to bail. Unless he acted on habeas corpus, or on surrender of the principal by bail, his jurisdiction was limited by the act of March 7, 1831. (Swan, old ed. 727.) He could only let to bail when the accused was confined on the mittimus of a judge or justice of the peace, or under a capias on indictment. *Ib.*
 10. In an action of debt upon a forfeited recognizance, a plea that the surety and prisoner were present at the appearance term, and that by their consent the case was continued until the next term, and that the surety then and there agreed to stand bail for the prisoner's appearance at the then next term, and that after the continuance, the prisoner was called, and the recognizance forfeited, is not a good plea in bar. *Swank v. The State*, 429.
 11. A recognizance in a criminal case conditioned "that the prisoner appear at the next term and thereafter, from day to day, and abide the judgment of the court, and not depart the court without leave," binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourns without making any order, the sureties are exonerated from the recognizance. *Ib.*
 12. During the appearance term, a new recognizance should be taken, or the prisoner committed to the jail of the county. *Ib.*
 13. Such recognizance may be taken either at the time of the continuance, or at any day thereafter during the term, and the prisoner may be called for that purpose after the continuance of the case, and if he fails to appear, his recognizance may be forfeited. *Ib.*
- See DEBT, 1.

II. IN CIVIL CASES.

A recognizance taken under the act of March 14, 1831, defining the duties of justices of the peace in civil cases, is sufficient, if taken in the form prescribed in the 111th section of that act; although neither the recognizance nor the transcript shows which party took the appeal. *Holton v. Wade and wife*, 543.

RECORD. See PARTNERSHIP.

RECOMPMENT—

1. Unsettled as were for a time the limits within which it could be made available, as well as the condition of its exercise, the right of recompment has at length become fixed and certain in England, as well as in most of our sister states, and it must now be recognized as a part of the law of Ohio. *S. B. Wellsville v. Geisse*, 323.
2. Recompment, however, even as enlarged in its meaning by modern usage, signifying nothing more than a reduction of damages, the right can not be exercised under a plea, the office of which is to set up a complete bar. Notice of the intention to *recoupe* must be given specially. *Ib.*

Release—Rem, Proceedings in.

RELEASE—

1. M. K. conveyed to M. K., Jr., and G. W. S., certain of his lands, part of the consideration being an agreement by the grantees to pay the debts due by the grantor at the mills and distillery, upon the property conveyed. To secure performance of this agreement, they reconveyed by way of recorded mortgage, in which some debts were named, and others referred to, without description, as specified in a certain schedule, which last was never recorded or delivered for record. Subsequently, and before the bringing of suit to impeach certain conveyances of M. K., as in fraud of creditors, the grantees aforesaid, doing business as partners, mortgaged part of the lands to E. & S., to secure a loan; and to make the security perfect, M. K. executed a release of the lien of his mortgage on the part covered by the mortgage to E. & S. Prior to the commencement of the suit before mentioned, some of the schedule creditors surrendered the evidence of their claims on M. K., and in lieu thereof, took the notes of M. K., Jr., and G. W. S., which remain unpaid. *Held*, 1. That the said schedule creditors could not impeach the conveyance to M. K., Jr., and G. W. S. Had the creditors retained the evidence of their claims upon M. K., the presumption would be that the notes of his grantees were collateral securities; but as they surrendered these evidences of indebtedness when they took the notes of third persons, the presumption is just the contrary. But, 2. It is fairly presumable, that the surrender was made with an understanding that they were to have the benefit of the mortgage to M. K. That, under these circumstances, they are entitled to have all the securities for the payment of the money that M. K. had, is well settled. 3. It is a very serious question whether E. & S. were charged by the record of the mortgage with notice of the debts named in the unrecorded schedule. 4. The release of M. K. in favor of E. & S., was available for its purpose. *Crumbaugh v. Kugler*, 544.
2. The same M. K., about the time of the conveyances sought to be impeached by his creditors, took into partnership his son J. K., who brought nothing into the partnership, and when it was dissolved, took nothing out. During the partnership, some of the complainants, who were creditors of M. K. at the date of his conveyances, took the notes of the firm of M. K. & Son, for the amounts due them, some of which notes were subsequently, and after the dissolution of the firm, given up, and the notes of the father again taken in lieu thereof. *Held*, that under all the circumstances, this case is clearly distinguishable from that first stated, as to the effect of the creditors giving up the original notes. The transaction was intended simply as a renewal. It does not militate against this idea, that J. K. became bound as well as his father; for a note with security may as well be a renewal of a former note, as one without security. *Ib.*

REM. PROCEEDINGS IN—

1. When, under our water-craft law, the remedy is pursued against the craft by name, the proceeding is *in rem*, and no other notice need be given than that arising from its seizure. *Keating v. Spink*, 105.
2. The proceeding authorized by the administration act of 1824, tested by its nature and essential qualities, would seem to be clearly enough a proceeding *in rem*. On the death of the owner, the law charged his debts as a specific lien on all his property, and held it subject to their payment. The legal title to the real estate descended to the heir subject to this paramount lien. The executor or administrator was a trustee alike for creditors and heir; and the order of sale upon his petition operated on the estate, and not on the heir, and the purchaser, by operation of law, took the paramount title of the ancestor, and did not claim through or under the heir. *Sheldon v. Newton*, 494.
3. The heir was required to be made a party to the proceedings with a view to his having notice; but it is nowhere intimated, that a failure to give notice should deprive the court of jurisdiction over the property. *Ib.*

Renewal—Stare Decisis.

RENEWAL. See **RELEASE.****RESPONDEAT SUPERIOR—**

1. It is a settled maxim of the common law, founded upon the highest obligations of social duty, that every one shall so use his own, and so prosecute his lawful business, as not by his negligence or want of care to injure others. Hence, the law exacts of him who puts a dangerous force in motion, that he shall control it with reasonable care and skill. *C., C. & C. R. R. Co. v. Keary*, 201.
2. He can not divest himself of this obligation by committing its control to another; but he still remains liable upon the maxim *respondeat superior*, for such injuries as arise from the negligence or carelessness of his agent while engaged in the prosecution of a business. *Ib.*
3. These principles apply where a railroad company place a brakeman in their employ under the control of the conductor, the latter having the exclusive command of the train, and the brakeman, without fault on his part, is injured by the carelessness of the conductor. In such case, the brakeman is entitled to recover of the company for the injury; the conductor being the sole and immediate representative of the company, upon which rested the obligation to manage the train with skill and care. *Ib.*
4. But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion. *Ib.*

See **RAILROAD COMPANIES**, 8, 9.**REVIEW—**

1. On a bill of review, a mere difference of opinion as to the weight of evidence, between the court which pronounced and that which reviews a decree founded on that evidence, will not warrant the reversal of the decree. *Tracey v. Sackett*, 1 Ohio St. 54, followed and approved. *Gazley v. Huber*, 399.

SALES—

1. A conveyance, by a fraudulent vendee of goods, in payment or security of the vendor's debt, requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property. *Webb v. Brown*, 246.
2. No just preference of creditors can be thus defeated; since, in every case in which the claim of the creditor is fair, the law would reward the greater vigilance of the creditor, and deny to any other a preference resting in the favor or fraud of the vendor himself. *Ib.*
3. Nor can the vendor suffer by allowing such a right in his vendee; for, if the consideration remain unpaid, he can well question the amount to be paid by the vendee, if the whole fraud has been removed, on his own part, and if the consideration be wholly paid, the vendee would pay, at his own immediate expense, and his own ultimate peril. *Ib.*

See **JUDICIAL SALES.****SET-OFF.** See **FRAUD**, 7.**SHERIFF.** See **AMERCEMENT.****STARE DECISIS—**

1. Having been adopted in the original states of the Union, and introduced into Ohio at an early period, the common law has continued to be recognized as the rule of decision in our courts, in the absence of legislative enactments, so far as its rules and principles appeared to be based on sound reason, and applicable to our condition and circumstances. It has no force in Ohio, except so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts; and this extends no further than it illustrates and explains the rules of right and justice, as ap-

Statutes Examined.

STARE DECISIS—Continued.

- aplicable to the circumstances and institutions of the people of the state. Per Bartley, J. Kerwhacker v. C. C. & C. R. R. Co. 177, 178.
2. The common law of England, when not inconsistent with the genius and spirit of our own institutions, and thus rendered inapplicable to our situation and circumstances, furnishes the rule of decision in the courts of this state. Per Rauney, J. C. C. & C. R. R. Co. v. Keary, 201.
 3. While the rule of *stare decisis* is the great safety of rights subject to judicial decision, maxims and regulations fitted to a former state of society and government are not to be preserved and forced into an unnatural application, when and where the very conditions necessary to them when established, have long since passed away. Per Warden, J. Faris v. The State, 159.
 4. It must be familiar to all, that while the tendency of the best and highest American decisions, as well as the very genius of our government, are favorable to an increased regard for the sanctity of the *person*, by the same law, many measures of defense as to *property* have become obsolete and shocking to the enlightened humanity of the day. If the rule that one must retreat to the wall before killing his assailant, has passed away, so has the day of mantraps and spring-guns. Per Warden, J. *Id.*
 5. Modern English cases, and the leading American decisions, have taken from the rules once applied to the construction of contracts, as to their entirety or divisibility, and the dependence or independence of their covenants, much of their ancient strictness and unreasonable refinements, not to say their absurd and oppressive character. In the language of Parker, J., in Johnson v. Read, 9 Mass. 83, they "show a disposition on the part of the judges to break through the bonds which some old cases had imposed upon them, and to adopt what Lord Kenyon, in one of the cases, calls the common-sense doctrine: that the true intent of the parties, as apparent in the instrument, should determine whether covenants are independent or conditional, instead of any technical rules, of which the parties were totally ignorant, and the application of which would, in most cases, utterly defeat their intention." This is, in our judgment, the proper rule of construction. Per Warden, J. S. B. Wellsville v. Geisse, 333.
 6. A course of practice in the several courts, having the jurisdiction of petitions for the sale of lands to pay the debts of deceased persons, has been recognized by decisions which have stood for twenty years, as properly supplying an omission in the law, and sufficient to fix the jurisdiction. During all that time, these decisions have constituted rules of property, and upon the faith of them men have invested their money. If an urgent case ever existed for the application of the maxim *stare decisis*, this is one. Sheldon's Lessee v. Newton, 494.

STATUTES EXAMINED—

1. The tax law of 1852. Exchange Bank v. Hines, 1; Ellis & Morton v. Linck & Thomas, 66; Milan & R. P. R. Co. v. Husted, 578.
2. Limitation act of 1831. Slater v. Cave, 80.
3. Limitation act of 1834. *Id.*
4. Section 39 of the crimes act, Swan, 275. Dick v. The State, 89; Parks v. The State, 101.
5. The act of February 26, 1840, "providing for the collection of claims against steamboats and other water-crafts, and authorizing proceedings against the same by name." Keating v. Spink, 105.
6. The act of March 23, 1840, to regulate the receipt and disbursement of the canal fund. The act of March 10, 1843, to reorganize the board of canal fund commissioners. The act of March 2, 1846, to prescribe the duties of the board of public works, canal fund commissioners, etc., and the act of the same date, to punish the embezzlement of public moneys, and for other purposes, so far as they prohibit the loan of public moneys. The State v. Butties, 309.

Stocks—Taxes.

STATUTES EXAMINED *Continued.*

7. Section 22 of the crimes act. *Mackey v. The State*, 362.
8. An act regulating descents and the distribution of personal estates. (Swan, old ed. note a, 286.) *Prickett v. Parker*, 394.
9. Sections 13, 14, 15, 16, of an act concerning mesne process in civil and criminal cases. *The State v. West*, 509.
10. The act of March 7, 1831 (Swan, old ed. 727), so far as it relates to the taking of bail by associate judges. *Ib.*
11. Section 4 of the act of 1846 (46 Ohio L. 95), relating to the taking of recognizances. *Ib.*
12. The act of March 7, 1831, as far as it relates to the power of a single judge to take bail. *Ib.*
13. Section 111 of the act of March 14, 1831, defining the duties of justices of the peace in civil cases. *Holton v. Wade and wife*, 543.
14. The act of 1845, "to authorize William Lewis, trustee of the Mechanics and Traders' Bank of Cincinnati, to commence and prosecute suits against the debtors of said bank." (Ohio L. L. 308.) *Bates v. Lewis*, 459.
15. The act of May 1, 1854, to abolish the criminal court of Hamilton county. *Stevens v. The State*, 453.
16. The act for the relief of occupying claimants of March 10, 1831, and the amendatory act of 1849. *McCoy v. Grandy*, 463.
17. The "act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," May 1, 1854. *Miller & Gibson v. The State*, 475.
18. The administration act of 1824. *Sheldon v. Newton*, 494.
19. The act regulating judgments and executions, passed March 1, 1831 (Swan, old ed. 484, sec. 32), so far as it relates to amercements. *Webb v. Anspach, Brother & Co.* 522.
20. Section 26 of the crimes act. *Hall v. The State*, 575.

STOCKS. See WILL, 76.

SURETY—

1. Usury in this state will not vitiate the entire contract on the part of a surety on a promissory note, but only render the note voidable to the extent of the illegal consideration. *Selser v. Brock*, 302.
 2. Where a joint and several promissory note in blank is signed by several persons as sureties, and delivered to the principal debtor, to be by him filled up and given to the payee, if an illegal rate of interest be agreed upon between the principal debtor and the creditor, and incorporated in the amount for which the note is made payable, the contract is voidable to the extent of the usury only, and creates a binding obligation on the part of the surety for the principal and legal interest, whether the usury be inserted with the knowledge and consent of the surety or not. *Ib.*
 3. If, with the *knowledge or assent* of the creditor, any material part of the transaction between the creditor and the principal debtor be misrepresented to the surety, the misrepresentation being such, that, but for the same having taken place, the suretyship would not have been entered into, the security so given, is voidable at law, on the ground of fraud. *Ib.*
 4. But where a fraud is practiced by a principal debtor in procuring a surety to sign a note without the knowledge of the creditor, the obligation of the surety is valid and binding. *Ib.*
 5. Where one of two innocent persons must suffer by the fraud of a third person, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong, must bear the loss. *Ib.*
- See RECOGNIZANCE; BILLS OF EXCHANGE AND PROMISSORY NOTES; AMERCEMENT.

TAXES—

1. The tax law of April 13, 1853, is valid and constitutional in the basis it

Title—Trusts and Trustees.

TAXES—Continued.

- provides for the taxation of banks, bankers, and brokers. *Exchange Bank v. Hines*, 1.
2. The tenth section of that law, which allows individuals and certain corporations, in giving their tax lists, to deduct their liabilities from the amount of their moneys and credits, is repugnant to the constitution of Ohio, and is void. The constitution permits no deduction of liabilities from moneys and credits. *Ib.*
 3. But that section may be treated as void without affecting the validity of the remainder of the act. The remainder of the act permits no such deductions. *Ib.*
 4. Choses in action are to be listed at their true value. If a note, for instance, is wholly worthless, it is not to be listed at all; if it is of some value, but less than its face, it is to be listed at what it is worth. *Ib.*
 5. The fact that property subject to taxation has not been listed, although it improperly increases the burden of taxation upon that which is listed, does not render the tax wholly void, or authorize the interference of a court of equity. *Ib.*
 6. Neither, in such a case, is the treasurer who has distrained, liable to an action, for it is not his fault that the property is not listed. *Ib.*
 7. The tax law of 1852, although it prescribes a different mode and greater rate of taxation than is provided for in the 60th section of the banking-law of 1845, is not repugnant to the constitution of the United States. *Ib.*
 8. But if it were, a court of equity has no jurisdiction to restrain the collection of the tax by injunction, even though the county treasurer may individually be insolvent. For an action of trespass affords a complete remedy at law to recover a judgment, and the act of March 14, 1853, "to enforce the collection of taxes," etc., provides the means for the payment of such judgment. *Ib.*
 9. That the legislature of Ohio has no constitutional authority, in conferring special privileges on a corporation, to abridge or relinquish to any extent, or in any manner whatsoever, by contract or otherwise, any portion of the power of taxation over its corporate property, has been settled by solemn adjudication, and is not now an open question in this state. *Debolt v. The Ohio Life Insurance and Trust Company*, 1 Ohio St. 564. *Milan & R. Plank-road Co. v. Husted*, 578.
 10. The ninth section of the charter of this corporation, which expressly provides, that in consideration of the expenditures which the company will necessarily have to incur in making and keeping up its plank-road, the property of the corporation of every kind *shall be forever wholly exempt from taxation*, must be construed with reference to the constitutional powers of the legislature, and as operative only to exempt the company from taxation under the authority of any laws existing at the time the act of incorporation was passed, but as wholly inoperative as against any subsequent law imposing a tax upon the company. *Ib.*

See ACTION.

TITLE. See JUDICIAL SALES; EXECUTORS AND ADMINISTRATORS; ESTOPPEL.

TRADE. See CONTRACT.

TREASURER. See TAXES.

TRUSTS AND TRUSTEES—

1. As a general rule, a trustee is not entitled to compensation, in the absence of an agreement to pay. He may claim for expenses, but he must render his account, and if not admitted, must clearly establish it. If he maladminister, and refuse to account, both compensation and expenses may be refused. *Gilbert v. Sutliff*, 129.
2. A trustee may not be accountable for an honest mistake, but where his duty is so plain that no man of ordinary intelligence could mistake it, he is responsible, if he has that intelligence. He can not shield himself from

Unauthorized Banking—Widow.

TRUSTS AND TRUSTEES—*Continued*

responsibility by doubts, that he takes no measures to either verify or dispel. *Ib.*

3. If an administrator purchases at his own sale, while the property remains in his hands, or in the hands of any purchaser from him with notice, the sale may be set aside in chancery at the election of the heirs, and the property again put up. *Sheldon v. Newton*, 494.
4. When an infant purchases at such sale, for the administrator, and immediately conveys to him, he can not disaffirm such sale on arriving at full age, as though the lands belonged to him. The law is perfectly settled, that an infant may absolutely and irrevocably execute a power, either by absolute deed, or otherwise, as fully and effectually as an adult. *Ib.*

UNAUTHORIZED BANKING. See FRAUD.

USURY. See SURETY.

VENDOR AND VENDEE. See FRAUD; MORTGAGE.

VERDICT—

1. In all trials for murder, the degree of the crime must be found as a matter of fact, and be specified in the verdict of the jury; and without an express finding, ascertaining the degree of the crime, the court is not authorized to inflict the punishment prescribed by law for either degree of the crime. *Dick v. The State*, 89.
2. On the trial of an indictment charging the crime of murder in the first degree, in the descriptive words of the statute, a verdict of "*guilty in manner and form as he stands charged in said indictment*," is insufficient. *Ib.*
3. A verdict of "*guilty in manner and form as charged in the first four counts of the indictment*," is not a sufficient finding on an indictment for murder in the first degree. The verdict must specifically find the degree of murder whereof the defendant is convicted. *Parks v. The State*, 1.

WATER-CRAFT—

1. The act of February 26, 1840, "providing for the collection of claims against steamboats and other water-crafts, and authorizing proceedings against the same by name," is a constitutional and valid enactment. *Keating v. Spink*, 105.
2. When the remedy is pursued against the craft by name, the proceeding is *in rem*, and no other notice need be given than that arising from its seizure. *Ib.*
3. The cases to which the act extends, are not of exclusive admiralty and maritime cognizance, but those over which the courts of admiralty and the common-law courts of the state have concurrent jurisdiction. *Ib.*
4. In such cases, the court first acquiring jurisdiction by seizure of the thing in controversy withdraws it from the jurisdiction of the other; and it can not be taken from the custody of the law, by process issuing from any other court. *Ib.*
5. Process issued upon proceedings instituted in admiralty for the recovery of seaman's wages, is no exception to this rule; especially when the court having the vessel in custody, is competent to recognize and enforce his paramount lien. *Ib.*
6. The sheriff or other officer having the vessel in custody, under the state law, is under no obligation, and has no right to surrender it to the marshal upon such process; and if he does so, is liable to the creditor in the state court. *Ib.*
7. An action does not lie, under the water-craft law, against a vessel, to recover money loaned. *Dewitt v. Schooner St. Lawrence*, 325.
8. Nor for a breach of an executory contract for the transportation of goods, where the goods are not delivered to the vessel, and where, therefore, the obligation of a common carrier never arose. *Ib.*

WIDOW—

A widow electing to take under a will containing provisions for her, expressed

Wills.

WIDOW—*Continued.*

to be in lieu of dower and all other claims on the estate of the testator, is not barred of her right to the year's support, provided by law, from the estate of the testator. *Collier v. Collier*, 369.

WILLS—

1. A will and codicil are to be taken and construed together, as parts of one and the same instrument, and the intent of the testator gathered from the whole. *Collier v. Collier*, 369.
2. A codicil will not be held to revoke the dispositions of a will, further than is clearly expressed or necessarily to be inferred from it. *Ib.*
3. A bequest to the wife of a testator of one-third of his real and personal property, directed to be sold and converted into money by his executors, is not impliedly revoked by a codicil which reserves from sale a part of such real property until her death, and secures to her the use of it during her life. *Ib.*
4. Where a part of such personal property consisted of stocks, which were by the codicil directed to be reserved from sale, and the executor directed to pay over the dividends as they accrued to the "heirs" of the testator: *Held*, that the bequests of the will were not revoked. *Ib.*
5. In such case, when the intention is manifest, the word "heirs" may be construed to mean legatees. *Ib.*
6. An unconditional bequest of the dividends of the stock is a bequest of the stocks themselves. *Ib.*
7. Lands directed to be sold and converted into money are treated in equity as personal property. *Ib.*
8. A widow electing to take under a will, containing provisions for her, expressed to be in lieu of dower, and all other claims on the estate of the testator, is not barred of her right to the year's support, provided by law, from the estate of the testator. *Ib.*

